Volume 7, No. 6, Pages 1826 to 2073, March 9 - March 20, 1992

FCC Record

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Citation Form: 7 FCC Rcd 1 (1992)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Jacor Broadcasting of Tampa Bay, Inc. File No. BR-881003YA

For Renewal of the License of
Station WFLA, Tampa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1992; Released: March 9, 1992

By the Chief, Audio Services Division:

1. This proceeding involves the application of Jacor Broadcasting of Tampa Bay, Inc. to renew the license of AM radio station WFLA, Tampa, Florida. Charles "Chuck" Harder (Harder) filed an Informal Objection to the application (*Objection*). Harder is President of the Sun Radio Network (Network), a company that provides programming to one of WFLA's competitors (AM station WEND).

2. Harder's *Objection* focuses on two WFLA call-in programs critical of himself, WEND, and the Network. He alleges that the content of these programs, which aired on December 8, 1988 and December 9, 1988, demonstrate an anti-competitive crusade by WFLA to force WEND and the Network out of business. According to Harder, the programs in question were unlawful because they encouraged listeners to harass Network employees, to cause monetary losses to the Network, and to physically damage the studios of the Network and WEND (which at the time were located in the same building). Harder also alleges that the broadcasts violated Commission policies concerning use of indecent language.[1] The *Objection*, which is supported by affidavits from Harder and several Network employees, includes a transcript of the broadcasts in question.[2] The transcript shows that the broadcasts at issue arose out of a discussion of why callers like particular radio stations and that the criticism of the Network arose out of the sale of merchandise on Network programming and the Network's dismissal of employees who also worked for WFLA.

DISCUSSION

3. In evaluating an application for license renewal, the Commission considers whether grant of the application would serve the public interest, convenience, and necessity. As part of this process, we consider whether any objections filed against the application raise substantial and material questions of fact requiring resolution in a hearing. *See* 47 C.F.R. § 73.3591(a). While the broadcasts at issue in the current case may have brought about some unfortunate results, as set forth below, we conclude that these broadcasts do not call into question the licensee's continued ability to serve the public interest. Accordingly, a hearing on this license renewal application would be both unnecessary and inappropriate.

4. We note at the outset that most of the allegations in this case focus on program content. Such allegations are generally significant at renewal time only to the extent that they show a failure by the licensee, in its overall programming, to address issues and problems of importance to the community.[3] Harder's allegations relate not to WFLA's overall programming during the license term but rather to a total of four hours within two days of the license term. With respect to such individual programming decisions, the Commission's role is quite limited. Both the First Amendment and Section 326 of the Communications Act prohibit the Commission from censoring broadcast material or from otherwise interfering with a licensee's discretion in selecting and broadcasting particular programming. *See* 47 U.S.C. § 326. Thus, for the programming allegations in this case to affect renewal of WFLA's license, we would need to determine that these programming matters fall within an exception to our general policy of non-interference with program content, and raise a substantial and material question of fact as to the licensee's continued ability to operate in the public interest. The record of this case does not support such a finding.

Anticompetitive Practices

5. First, we consider Harder's allegation that WFLA abused its broadcast license by airing anticompetitive statements directed at WEND and the Network. For example, a WFLA announcer allegedly stated that WEND "certainly is included in the lexicon of leeches and parasites on the face of the radio dial." Transcript at 51. The announcer also allegedly described the Network's programming aired on WEND as "the lowest common denominator, non-localized garbage programming . . . absolute mindless trash." *Id.* at 54. In addition, the announcer allegedly stated that "before deregulation, what is going on now [at WEND] would be illegal" and allegedly accused its competitor of having no commitment to its community: "You can take that building and run a dog kennel in it and have more local commitment. . . we're talking about [misuse] of a public trust. Ya, I'm talking about WEND. I'm talking about a station that's only commitment to this community is a power bill." *Id.* at 60, 62, and 66.

6. There is no Commission rule or policy prohibiting a licensee from criticizing a competitor. Thus, to the extent that Harder is objecting to program content, our policy of non-intervention would apply. To the extent that Harder's allegations go beyond program content, however, they could be relevant. In determining whether a broadcaster continues to possess the character necessary to remain a Commission licensee, we will consider such factors as whether the licensee engaged in broadcast related anticompetitive practices.[4] Only *adjudicated* violations of anticompetitive or antitrust laws are generally relevant to this determination, however.[5] Harder does not allege that his charges of anticompetitive practices have been adjudicated by any court or government agency, but rather indicates that the Commission should make this initial determination.[6] We decline to undertake such an inquiry because primary expertise and responsibility for these issues rests with the courts and other government agencies, most notably the Department of Justice and the Federal

Trade Commission. Accordingly, we find that Harder's unadjudicated allegations do not raise any substantial and material question of fact about the licensee's character.

Encouragement of Unlawful Activities

7. Next, we consider Harder's allegation that the broadcasts in question encouraged unlawful activities. One exception to our general policy of non-interference with program content involves programming that produces "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *See Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190, 191 (1966) *citing Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). If a licensee broadcasts material that produces a clear and present danger, the Commission may consider such conduct when determining whether to renew or to take sanctions against the offending licensee.[7] To determine whether language presents a clear and present danger, one must examine not only the content of the speech but also the context in which it is heard. Unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," speech does not lose its constitutional protection, even if it advocates the use of force or the violation of law. *See Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969).

8. Harder alleges that the WFLA broadcasts at issue contained several statements that advocated violent and/or illegal activity directed against WEND and the Network. For example, in a discussion of what listeners would do if they owned WEND or the Network, a WFLA announcer allegedly suggested to a caller that he "dig long trenches alongside [WEND's] towers, chop them off, and let them . . . fall into a grave." Transcript at 88. Another caller allegedly stated that if he owned the Sun Radio Network he would "probably take a bulldozer and . . . demolish it." *Id.* at 122. Harder alleges that one caller offered to "kick the door [of the Network] and knock the whole damn building down" to which the WFLA announcer suggested that the caller drive by the WEND/Network building and honk his car horn instead. *Id.* at 146. Harder also alleges that WFLA encouraged listeners to harass Harder, to jam the Network's phone lines, and to cause monetary losses to the Network by repeatedly calling the Network's toll free number.[8] *Objection* at 3-4.

9. Harder states that the following actions resulted from WFLA's broadcasts:

> WFLA listeners drove to the Network's studios, honked their car horns, gestured obscenely, took photographs of people entering and leaving the studios, and attempted to appear threatening. WFLA listeners called the Network with bomb threats and death threats, and subjected Network employees who answered their calls to vicious racist and antisemetic slurs. WFLA listeners also called the Network to brag about having dumped garbage at the transmitter site of WEND. . . . Nuisance calls jammed the Network's phone lines for more than a week. The 800-line phone bill skyrocketed.

Objection at 3-4.

10. The alleged results of the broadcasts are unfortunate and could properly be the subject of local law enforcement and/or court action.[9] After examining the content and context of the language that WFLA allegedly broadcast, however, it is clear to us that the speech in question did not raise a clear and present danger. *See generally Atlanta NAACP (Lonnie King)*, 36 FCC 2d 635 (1972) (no clear and present danger found despite bomb threats). Few of the actions discussed on the broadcasts were imminent. Rather, WFLA listeners and announcers discussed what they might do *if* at a future date WFLA organized a remote broadcast from the Network's location or *if* the listeners owned WEND or the Network. The few matters discussed that might be considered imminent, such as encouragement of a listener near the Network's studio to drive by and honk his car horn, did not rise above public inconvenience, annoyance, or unrest.

11. With respect to WFLA's alleged encouragement of harassing and threatening telephone calls, we note that in 1983 the Commission eliminated its policy on such calls which result from station broadcasts. *Elimination of Unnecessary Broadcast Regulation*, MM Docket No. 83-842, 54 RR2d 1043 (1983). It did so, not because it felt that the stimulation of such phone calls is appropriate but, instead, because the policy "potentially encroaches upon licensees' editorial freedom. The line between harassing phone calls and legitimate broadly felt expressions of disapproval can be fine indeed." *Id.* at 1054. At that time, the Commission described alternative civil and criminal remedies available to parties who have received harassing or threatening phone calls as a result of station broadcasts. *Id.* There is no evidence that Harder has pursued any of these remedies, or that WFLA's alleged activities have been adjudicated as violations of any relevant state or federal law. *See, e.g.*, 47 U.S.C. § 223. Accordingly, while we do not condone the conduct described, we cannot find that WFLA's decision to air allegedly inflammatory material raises any issue appropriately addressed in the license renewal context.

Indecency

12. Finally, we consider Harder's allegation that WFLA broadcast indecent speech. The U.S. Supreme Court has recognized that indecent speech, while protected by the First Amendment, may, in the context of broadcasting, be subject to government-imposed time, place, and manner restrictions due to the unique pervasiveness of the broadcast medium. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Indeed, the Commission has a statutory obligation to take regulatory action when it determines that a broadcast contains indecent material. *See* 18 U.S.C. § 1464. A program is "indecent" if it "describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented. *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 932 (1987), *aff'd in part and remanded in part sub. nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

13. Harder alleges that on the afternoons of December 8, 1988 and December 9, 1988, when there was a risk that children may have been in the listening audience, WFLA announcers used indecent language on the air. Harder's allegation relies primarily on the announcers' repeated use of the word "suck." For example, throughout the December 9th broadcast, they allegedly referred to Chuck Harder as "Suck Harder," "Suck," and "Suckie" and

called the Sun Radio Network the "Suck Harder Radio Network." *See, e.g.*, Transcript at 84, 100, 107, 161. Harder also alleges that a WFLA announcer used indecent language when he called Harder a "useless piece of crap." Transcript at 101. We have examined the transcript but find that the language complained of is not, taken in context, actionably indecent.

CONCLUSION

14. Based on the foregoing, we find that the Objector fails to raise a substantial and material question of fact requiring resolution in a hearing. We further find that the applicant herein is fully qualified and that grant of its renewal application serves the public interest, convenience and necessity.

15. Accordingly IT IS ORDERED that the Informal Objection of Charles Harder to the license renewal application for WFLA, Tampa, Florida IS DENIED.

16. IT IS FURTHER ORDERED that the license renewal application of Jacor Broadcasting of Tampa Bay, Inc. for AM Station WFLA, Tampa, Florida IS GRANTED.

17. This action is taken pursuant to delegated authority. *See* 47 C.F.R. §§ 0.61(c) and 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In addition, Harder makes two allegations that we will not entertain. With respect to Harder's first claim, that WFLA used its license to deceive and defraud the broadcast public, we observe that there is no support for this allegation other than a bare statement that WFLA deliberately broadcast false information about Harder. *Objection* at 1-2. Such allegations are properly the subject of private defamation actions, not of Commission licensing proceedings. *See Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190, 191 (1966).

With respect to Harder's second allegation, that WFLA violated the personal attack rule, we note that an isolated violation of the personal attack rule would not generally raise a substantial and material question of fact. Moreover, we cannot find that application of the rule would be appropriate in this case because Harder does not define the issue during which attacks on his honesty were allegedly made, or demonstrate that this issue was controversial and of public importance. *See* 47 C.F.R. § 1920. Furthermore, the transcript that Harder submits indicates that he called WFLA during the December 8th broadcast and was given an opportunity to respond. Transcript at 78-79.

[2] The licensee was served with a copy of the *Objection* but did not file a response. We find that we are able to proceed without a response from Jacor, given the extensive transcript of the WFLA broadcast which provides a background of WFLA's actions and which does not indicate any violation of our rules.

[3] *See Deregulation of Radio*, 84 FCC 2d 968, 982 (1981), *recon. granted in part and denied in part*, 87 FCC 2d 797, *aff'd in relevant part and remanded in part*, 87 FCC 2d 797, *aff'd in relevant part and remanded in part sub. nom. Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

[4] *See Policy Regarding Character Qualifications In Broadcast Licensing*, Gen. Docket No. 81-500, 102 FCC 2d 1179, 1201 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), *modified* 5 FCC Rcd. 3252 (1990) (*Character Qualifications*).

[5] *See Character Qualifications*, 102 FCC 2d at 1202. While the Commission retains the discretion to consider unadjudicated matters in cases raising particularly egregious misconduct, we do not find the alleged conduct in the present case to rise to that level. *See generally Character Qualifications*, 102 FCC 2d at 1205 n.60.

[6] In a separate submission, Harder does allege that a broadcast station in Jacksonville, Florida sued the licensee for an alleged attempt by Jacor to put that station out of business. Letter from Chuck Harder to Donna R. Searcy, Secretary, FCC (May 4, 1989). However, there is no indication that the court in that case found the licensee to have violated anti-trust or anti-competitive laws.

[7] *See Cattle Country Broadcasting, Inc.*, 58 RR2d 1109, 1113 (per curiam 1985); *see also The Columbus Broadcasting Co., Inc.*, 40 FCC 641 (1965); *Letter to David Honig (Miami NAACP)*, Stations WIOD and WGTR, (Audio Services Division January 18, 1990).

[8] Harder also alleges that, in a spoof of the Network's programming, WFLA aired the number (800) BAD-BULB, which belongs to a business not related to the Network, and that this business suffered monetary losses as the result of WFLA's actions. *Objection* at 5. If the business wishes to pursue this matter against WFLA it can do so in court. However, this issue is not the proper subject of a Commission licensing proceeding.

[9] *See generally Elimination of Unnecessary Broadcast Regulation*, MM Docket 83-842, 57 RR 2d 939, 942 (1985) (public disorder from broadcast promotions best handled by local authorities); *Rusk Corporation*, File No. BALH-891120EC, *slip op.* at 4 (Video Services Division October 31, 1990) (tort actions possible but difficult against the media).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-86

In re Applications of

GREAT LAKES BROADCASTING, INC.	File No. BPH-870327KA
HURON COMMUNICATIONS COMPANY LIMITED PARTNERSHIP	File No. BPH-870331OB
NCB ENTERPRISES, INC.	File No. BPH-870401KS
LUIPOLD BROADCASTING INC.	File No. BPH-870415MO

For Construction Permit for
New FM Station, Channel 241A,
Huron, Ohio

Appearances

James L. Oyster, Esquire, on behalf of Great Lakes Broadcasting, Inc.; *Dan J. Alpert, Esquire*, and *Ann Bavender, Esquire*, on behalf of Huron Communications Company Limited Partnership; *Dennis J. Kelly, Esquire*, on behalf of NCB Enterprises, Inc.; and, *Howard M. Liberman, Esquire*, and *Gerald Stevens-Kittner, Esquire*, on behalf of Luipold Broadcasting Inc.

DECISION

Adopted: February 19, 1992; Released: March 10, 1992

By the Review Board: MARINO (Chairman) and ESBENSEN, Board Member BLUMENTHAL concurring in result.

Board Chairman MARINO:

1. Luipold Broadcasting, Inc. (formerly Firelands Broadcasting Corp.) (Luipold) was found to be the superior comparative applicant for a new FM station in Huron, Ohio. *Initial Decision*, 5 FCC Rcd 2919 (1990) (I.D.), of Administrative Law Judge Joseph P. Gonzalez (ALJ). Its superiority was based upon 100% participation of ownership integrated into management, enhanced by long-term service residence combined with civic involvement, a gender preference for female ownership, and broadcast experience. Luipold also was awarded a diversification preference over its closest competitor, Huron Communications Company (Huron). I.D., para. 62. The competing applicants filed exceptions urging a remand hearing to decide whether Luipold had falsely certified that its original transmitter site was reasonably available. This challenge to Luipold's basic qualifications was resolved by the Commission in its *Memorandum Opinion and Order*, 6 FCC Rcd 4331 (1991) (Luipold found to have "reasonable assurance" of transmitter site; application reinstated).

2. We now turn to the other contentions regarding the comparative aspects of the case: (a) Luipold's integration proposal is a "sham" entitled to no comparative credit, or at most 33-1/3%; (b) "[T]he award of a preference for female ownership" to Luipold is "unconstitutional" and "unconstitutional and illegal"; and (c) Luipold should not have received any enhancement credit for local residence and civic activities outside of Huron, the community of license. We affirm the ALJ's selection of Luipold as the comparatively superior applicant.

BACKGROUND

3. Shelley Luipold is the sole voting stockholder and one-third equity owner of Luipold; Jay Wagner owns one-third of the equity of the applicant, and no voting stock; and the remaining one-third equity ownership is divided equally between George Mayer and John S. Stipp. I.D., para. 44.

4. Ms. Luipold proposes to work full-time at the station as its general manager. I.D., para. 45. Since 1965, she has worked at local radio stations as a writer, a producer of commercials, and an on-air-personality. She was employed by Wagner at a local radio station from 1965 until 1971 (when Wagner was that station's general manager and president). Firelands Exh. 2. Thereafter, Ms. Luipold continued to work at that station until 1987, and is now working at another station in the area. I.D., para. 47.

5. Ms. Luipold has lived within the station's service area for the last 43 years, and participated in a number of service area civic activities in Greater Sandusky, and other Erie County activities. I.D., para. 46. She has promoted boating safety and restoration of an historic paddleboat, served as an officer of a Cub Scout pack, and volunteered on a public school committee to promote racial integration. She chaired the school's 1987 parents/student Orientation and Public Relations Committee, and was a judge of the Erie County Fair. She has also done volunteer work at a local hospice, and as a Sunday School teacher at a local church. I.D., para. 47.

QUANTITATIVE INTEGRATION PROPOSAL

6. Two competing applicants challenge the 100% quantitative integration credit awarded Luipold, contending that Luipold's "organizational structure is a sham," entitled to no comparative credit (Great Lakes Broadcasting, Inc. Br. p. 4), and that "its putative non-voting owners, particularly Jay Wagner," were materially involved in the application (NCB Br. pp. 25 & 32).

7. Like other broadcast applicants, Ms. Luipold is permitted to maximize her comparative credit for integration of ownership into management and minimize any disadvantage resulting from ownership and control of other broadcast stations by utilizing a corporate form with voting and non-voting stock. The non-voting stockholders must be fully insulated, however, as required by Commission policy, and must be completely passive and not active or in control of the applicant. *See generally Evergreen Broadcasting Co.*, 6 FCC Rcd 5599 (1991) and cases at 5601 therein. If doubt is raised concerning the *bona fides* of the proposal, the ALJ must consider "the entire

record, that is, the totality of the facts concerning the principals' pre- and post-formation activities, as well as the circumstances surrounding the applicant's formation." *Evergreen* at 6 FCC Rcd at 5600-5601.

8. Prior to awarding Luipold 100% comparative credit, the ALJ satisfied himself that "the evidence of record viewed as a whole demonstrated that Ms. Luipold was the moving force behind the application." In detailed findings and conclusions, I.D., paras. 51-57, he reviewed the evidence about the initiation and prosecution of the application. Briefly summarized, the findings, I.D., para. 52, establish that:

> (a) Ms. Luipold initiated the idea of applying for the proposed station;
>
> (b) She recruited both Wagner and Mayer;
>
> (c) She prepared the construction and operation budget;
>
> (d) She retained both legal and engineering counsel;
>
> (e) She prepared the application with counsel's assistance; and,
>
> (f) She located and secured her current transmitter site.

In other findings, I.D., paras. 53-54, the ALJ focused upon the activities of Luipold's "passive" owners. In essence, Ms. Luipold asked Wagner to locate legal counsel, and the original transmitter site, which site she later replaced. Luipold also followed Mayer's suggestion regarding the financing of the project. Since Mayer is both a broadcaster and an experienced banker, Luipold asked him to make the initial contact with the bank. But the ALJ also found that after the initial contact, "Ms. Luipold corresponded by mail with an official of the lending institution." I.D., para. 54. Additionally,

> . . . Ms. Luipold has more than 20 years of broadcasting experience. She holds 30 percent of the equity in the corporation, and she is contributing her pro-rata share of the costs of prosecuting [the] application. In addition, she has been involved in each and every aspect of the application process. Although Messrs. Wagner and Mayer performed certain tasks at her direction such as securing communications counsel, the original transmitter site as well as the financing for the proposal, Ms. Luipold secured the present transmitter site, prepared the budget for the station, actually retained communications and engineering counsel (Tr. 365), and prepared the application. *There is no evidence of record that Messrs. Wagner and Mayer performed any tasks for [Luipold] after those initial activities.* (emphasis added).

I.D., para. 55. Based on the totality of the record evidence, the ALJ concluded that (*id.*):

> [It was] perfectly reasonable . . . in view of the backgrounds of Mr. Wagner and Mr. Mayer, that Ms. Luipold initially sought their assistance in moving the proposal forward. It does not follow, however, that she will continue to rely on these gentlemen, or that they will control or assist in any way in the management of the station in the event that [Luipold] is the successful applicant. Her actions on behalf of the enterprise, as set forth in the record, demonstrate that she is [in] control of the venture and capable of making decisions with respect to matters of significance without the assistance of either Mr. Wagner or Mr. Mayer.

9. Our review of the I. D., in the light of controlling precedent, indicates that the ALJ, who had an opportunity to observe the testimony of Luipold's principals, was correct in finding that the questions raised concerning the *bona fides* of Luipold's application was not close. We agree with Luipold's contention that: "The record shows that Mrs. Luipold is the prototype, rather the antithesis, of a voting shareholder entitled to full integration credit." Reply at 22. In fact, two of the other competitors have conceded the *bona fides* of Luipold's proposal, and urge that credit should be reduced only because of the active participation of passive owners. Huron Br. 23-26; Roberts Br. 18-21.

10. On this point, Commission precedent requires that: "where a passive owner is shown to be involved in the applicant's activities after that applicant has been held out as a passive investor, that owner's interest will be considered for comparative purposes." *Coast TV*, 5 FCC Rcd 2751, 2752 (1990). Evidence of such post-organizational activity is deemed "better" in deciding whether the nominally controlling owners will actually exercise exclusive control. *See Evergreen*, at 6 FCC Rcd at 5601. Here, the record establishes that the activities of the passive owners discussed above, para. 8, occurred prior to the filing of the articles of incorporation creating two classes of stock. Moreover, the ALJ found that "after those initial activities," the passive owners did not perform any other tasks for the applicant. We therefore adopt his ultimate conclusion that (I.D., para. 57):

> [T]here is no evidence of record which demonstrates that any non-voting shareholder will have any material involvement whatsoever in the day-to-day operations of the station or be in a position to influence or exercise control over the operations of the station. The Messrs. Wagner and Mayer are found, therefore, to be merely passive investors in [Luipold]. This applicant is entitled, therefore, to a 100 percent quantitative integration credit for its proposal to integrate its sole voting shareholder into the affairs of the station.

QUALITATIVE ENHANCEMENTS

11. Two applicants have challenged the constitutionality of the ALJ's award of qualitative enhancement credit to Luipold for 100% female ownership. Great Lakes Br. p. 4, and NCB Br. p. 44. For reasons set forth below, we need not reach this argument because even without the enhancement for female ownership, Luipold is the comparatively superior applicant.

12. Only Huron, Br. pp. 22-23, has argued that, because Mrs. Luipold lives in Sandusky (which is not contiguous to Huron, Ohio), she should have been awarded only slight enhancement credit for her residence and civic activities. The record establishes that Luipold's residence in the Greater Sandusky area is some 10 miles from Huron, in the same county, and within the service area of

the proposed station. In its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), the Commission indicated that residence and civic activities within the proposed service area "closely follows" residence in the principal community, here Huron. Our case is controlled by the Commission's decision in *Waters Broadcasting Corp*, 91 FCC 2d 1260, 1262-63 (1982) (subsequent history omitted). There, two communities were thirty miles apart and in different counties (rural and urban), but in the same service area. Citing the *Policy Statement*, *supra*, the Commission reversed our award of "only slight enhancement credit" for residence and civic activities and held that credit should have closely followed that awarded for residence in the principal community. The facts in the present case are much more favorable to Luipold since the communities here are closer and in the same county, and many of the civic activities concern area-wide interest. Thus, there is no factual or legal basis for Huron's contention. Luipold is entitled to significant enhancement credit under the unified residence-civic activities factor. *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 (1991).

SUMMATION OF COMPARATIVE FACTORS

13. In its *Policy Statement*, the Commission declared that "integration," participation of ownership in the management of the proposed station, is a factor of substantial importance. 1 FCC 2d at 395. "It is inherently desirable that legal responsibility and |full-time integration in| day-to-day performance be closely associated." *Id.* (No one here has challenged the applicability of this factor, *see however Susan M. Bechtel v. FCC*, No. 91-1112 (D.C. Cir. January 31, 1992); on the contrary, all applicants have sought integration credit.) Subsequent cases have established that where a sufficient quantitative integration ownership difference exists between applicants, the Commission looks only to the quantitative difference in selecting the superior comparative applicant. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989) (subsequent history omitted). A difference of 12.5% in ownership integration is deemed a decisional quantitative difference. *Id.* Luipold, Huron, and Great Lakes, were awarded 100% integration credit, I.D., para. 61, and are entitled to be further compared on the traditional enhancement factors. NCB, on the other hand, was only awarded 65% credit (to which it has not excepted); thus, it suffers from a decisionally quantitative difference, and is not entitled to further comparison. *Miracle Strip*, *supra*.

14. Among the decisional qualitative enhancement factors to be considered in this case are: (a) local residence and civic participation, (b) minority ownership; and (c) past broadcast experience. *Miracle Strip*, *supra*, 4 FCC Rcd at 5065. Local residence and minority ownership factors are deemed of equal weight, *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). Past broadcast experience is deemed of minor significance, *Policy Statement*, 1 FCC 2d at 396.

15. Under Commission precedent, Luipold is entitled to a significant credit on the unified factor of local residence and past civic activities. Luipold's long-term residence (43 years), and diversified local and county-wide civic activities, para. 5, above, demonstrate a commitment to and continuing knowledge of, and interest in, the entire service area. *See Colonial Communications, Inc.*, 7 FCC Rcd 674 (1991). Further enhancing Luipold's preference is some twenty years of past broadcast experience at stations in the service area.

16. Huron, although declared to be in second place in the I.D., para. 62, was awarded a slight diversification demerit, which ruling is of questionable validity. *See* Huron Br. 3-7. This point is not decisionally significant, however, because, as Luipold correctly points out in its Reply, Br. 3-24, even assuming no diversification demerit, enhancements for minority status and a promise to move to the community of license are accorded less weight than enhancements for unified long-term residence/civic activities and past broadcast experience. The gender preference Luipold received from the ALJ is therefore of no decisional significance.

17. Great Lakes, in turn, was awarded enhancement credit for some 17 years of local residence, and a promise to move to the community of license. I.D., paras. 12 and 27. However, on the equally important factor of service area civic activities, the ALJ found that Great Lakes, I.D., paras. 12-13, was entitled to only slight credit. Past precedent, fully reviewed in *National Communications Industries*, 6 FCC Rcd 1978, 1982 (Rev. Bd. 1991), establishes that Great Lake's credit should not have been diminished solely because it was "work related," as found by the ALJ; here, however, the ALJ also found that Great Lakes' principal terminated his civic activities in 1986 when he ceased to perform his related church and broadast work. I.D., paras. 12-13. On the unique facts in the case, we affirm the ALJ's decision to diminish Great Lakes' civic activities credit because they were not as extensive and ceased in 1986; Luipold, on the other hand, received significant credit on the unified factor of local residence and continuing civic activities, and prevails over Great Lakes even without its gender preference. We, therefore, affirm the ALJ's selection of Luipold as the superior comparative applicant.

18. ACCORDINGLY, IT IS ORDERED, That NCB Enterprises, Inc.'s motions to enlarge issues filed June 13, 1990; its contingent appeal filed April 10, 1991; its motion to strike filed April 25, 1991; its appeal, notice of appeal, and request for oral argument filed June 17, 1991; its motion to dismiss, or in the alternative motion to enlarge filed June 17, 1991; its motion to enlarge filed June 17, 1991; and its motion for oral argument filed July 31, 1991, ARE DISMISSED, as moot;

19. IT IS FURTHER ORDERED, That the appeal filed by Luipold Broadcasting, Inc., on April 11, 1991, IS DISMISSED; and,

20. IT IS FURTHER ORDERED, That the motion to dismiss appeal, notice of appeal, and motion to enlarge issues filed by Huron Communications Limited Partner on June 28, 1991, IS DISMISSED; and its motion for correction of transcript filed November 5, 1990 IS GRANTED and the transcript IS CORRECTED; and,

21. IT IS FURTHER ORDERED, That the motion to strike filed August 26, 1991 by Great Lakes Broadcasting, Inc. IS DISMISSED; and,

22. IT IS FURTHER ORDERED, That the petition for leave to amend filed July 3, 1990 by Firelands Broadcasting Corp. (now Luipold Broadcasting Inc.) IS GRANTED, and the amendment IS ACCEPTED; and,

23. IT IS FURTHER ORDERED, That the application of Luipold Broadcasting Inc. (File No. BPH-870415MO), for construction permit for a new FM station on Channel

241A in Huron, Ohio, IS GRANTED; and that the applications of Great Lakes Broadcasting, Inc. (File No. BPH-870327KA); Huron Communications Company Limited Partnership (File No. BPH-870331OB); and NCB Enterprises, Inc. (File No. BPH-870401KS), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
DG ENTERPRISES, INC.	File No. BPH-861217ML
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
Rudy A. Lindsey, Sr. and Faye B. Lindsey, Husband and Wife, A Tenancy by the Entireties, d/b/a LINDSEY CHRISTIAN BROADCASTING COMPANY	File No. BPH-861217MO
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA

For Construction Permit for
New FM Station, Channel 246C2,
Goodlettsville, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: March 11, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

1. By *Order*, 6 FCC Rcd 6139 (1991) (*Remand Order*), the Commission remanded this case to the Review Board for further consideration. The Board had previously certified the case to the Commission for a final decision because its two participating members had divided views in response to exceptions filed to the *Initial Decision*, 5 FCC Rcd 3965 (1990) (I.D.), in the proceeding (*i.e.*, the Board Chairman supported the affirmance of the I.D.'s selection of DG Enterprises, Inc. (DG) as the comparatively superior applicant, and Board Member Esbensen concluded that the proceeding must be remanded for further inquiry into DG's financial qualifications. Board Member Blumenthal had recused himself from the proceeding. *See* 4 FCC Rcd 8627 (Rev. Bd. 1989)). The Commission observed in its *Remand Order*, however, that it was not necessary for it to intervene because, by action effective October 1, 1991, it had appointed a fourth member to the Board, who would now be eligible to sit in judgment on the case and break the deadlock after reviewing the record and reading the transcript of the oral argument on the exceptions. The augmented panel has now considered the exceptions in accordance with the Commission's directive. For the reasons set forth below, the Board finds it necessary to remand the proceeding to the ALJ on basic financial qualifications issues against DG. The Board also has reviewed the pleadings regarding Lindsey Christian Broadcasting Company's financial qualifications and is designating similar issues against Lindsey.

DG ENTERPRISES, INC.'s FINANCIAL PROPOSAL

2. Four of the unsuccessful applicants, Heidelberg-Stone Broadcasting Company (HSBC), William E. Benns, III (Benns), Goodlettsville Broadcasting Company, Inc. (GBC), and SAR Broadcasting, Inc. (SAR), except to the ALJ's rulings denying petitions to enlarge issues filed by GBC and Goodlettsville Community Broadcasting, Inc. (GCBI) on April 17 and April 26, 1989, respectively, which sought financial qualifications and false certification issues against DG. Both petitions were based in the main on the deposition testimony of Dena G. Groden, DG's president and 75% stockholder, taken on March 13, 1989.

3. Groden testified that, in December 1986 when she certified that DG was financially qualified, the certification rested on an oral understanding with J. Dan Gilbert of Heidtke and Associates, an investment brokerage firm in Nashville, Tennessee. Her only previous knowledge of Heidtke was that of reputation; she had heard that, in the past, they had made "loan arrangements for businesses." No loan commitment was ever reduced to writing, either by Gilbert or Heidtke, and she stated that Gilbert was speaking on behalf of Heidtke. Groden conceded that, although she met with Gilbert on three occasions, she was never asked to submit documentation regarding her station proposal, nor did she ever provide personal financial statements for herself and the other DG stockholder, Karen D. Browne, or any credit references. Nor was any-

thing reduced to writing regarding what was agreed to or said in her meetings with Gilbert. She noted at deposition, however, that DG was no longer relying on the oral understanding. On the advice of counsel, she stated, DG had secured a written loan commitment from the Sovran Bank of Nashville, Tennessee, in early 1989. A letter from the bank, dated February 16, 1989, and signed by its Senior Vice President, Doswell P. Brown, indicating the bank's intention to provide the funding for construction and operation of the proposed station, had been supplied to the parties before the deposition session. As she had with Gilbert, however, Groden acknowledged at the deposition that she had not provided any financial statements to the bank or initiated a loan application.

4. Both enlargement petitions highlighted the absence of a written financial commitment at the time of the certification, and GCBI further attacked the adequacy of the 1989 bank letter, focusing on language therein that explicitly forewarned that the letter was not binding upon any of the parties. GBC sought a false certification issue, while GCBI asked for both financial qualifications and false certification issues against DG. Also included in DG's discrete oppositions to both petitions was a letter dated February 15, 1989, to Groden from Gilbert on the letterhead of National Life of Vermont, purporting to show that DG's financial commitment had been in force until the bank commitment was secured. The letter provided in part:

> Your request for release from our December, 1986, funding agreement and fee arrangement is hereby granted. We do so for two reasons:
>
> 1. Your new commitment will be more flexible than the one we had, and
>
> 2. My change of affiliation from Heidtke and Company to National Life Insurance Company of Vermont would necessitate time delays required to re-document, which you cannot now afford.

5. The ALJ denied both petitions from the bench, *see* Tr. 1569-1572 -- subsequently memorializing his rulings by *Order*, FCC 89M-1694, released June 19, 1989. In rejecting the false certification request, the ALJ adverted to a declaration signed by Gilbert, attached to DG's oppositions filed May 11, 1989, in which Gilbert corroborated Groden's assertions concerning her discussions with him and confirmed that he had indeed advised her that sufficient funds would be made available to DG for construction and operation costs. Tr. 1570-1571. The ALJ found that the unrebutted oppositions demonstrated a complete absence of deception and established that DG had acted in good faith at the time of its financial certification. Tr. 1571. He further reasoned, in denying the request for a financial qualifications issue, that the Commission has never required an applicant to obtain a binding loan agreement and that the Sovran Bank letter established reasonable assurance of the availability of the requisite funds. Tr. 1572.

EXCEPTIONS

6. GBC argues in its exceptions that, under prior Commission precedent, both DG's purported arrangements with Heidtke and the bank letter upon which DG currently relies warrant further examination, relying on *Charisma Broadcasting Corp.*, 5 FCC Rcd 2916, 2917 (Rev. Bd. 1990); *Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd.), *clarified*, 5 FCC Rcd 2622 (Rev. Bd. 1990); and *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), for support. It refers to DG's failure to submit any data to Gilbert or the bank that would permit either to make a preliminary judgment on the acceptability of any potential loan, the failure to show reliable evidence that Heidtke ever intended to supply reasonable assurance of funding to DG, and the absence of a showing that Heidtke made loans of any sort or had funds available in December 1986 to lend to DG. Moreover, it notes that no explanation was provided how Gilbert, after switching affiliation from Heidtke to National Life of Vermont, might have authority to issue a release on Heidtke's behalf. HSBC similarly argues that *Charisma* is controlling with regard to the Heidtke oral arrangement. It further argues that a false certification issue is warranted in light of Groden's claimed awareness of the Commission's financial requirements at the time of certification. HSBC also argues that the Sovran Bank letter was issued as an accommodation rather than an authentic loan commitment. Benns adds that the documents before the ALJ raise an ambiguity whether the original commitment was made by Gilbert, individually, or on behalf of his then-employer, Heidtke. If it was with Gilbert, Benns argues, there was no showing that Gilbert's personal financial wherewithal would provide reasonable assurance of the requisite funds. Benns also asserts that DG may not substitute the Sovran Bank letter for the alleged oral financing agreement unless it can show that it had the requisite reasonable assurance at the time of the original certification. Finally, SAR also enumerates the circumstances detailed above for its claim of error on the part of the ALJ.

7. In reply, DG initially interposed a procedural objection to the allegations, contending that they should be rejected without further consideration. It asserted that only GCBI and GBC appeared at the depositions given by the DG principals upon which the allegations are largely based, and that none of the other parties submitted a petition to enlarge, or comments to such petitions. It further observes that only GCBI alleged before the ALJ that DG may not have been financially qualified -- a claim predicated solely on DG's failure to obtain written confirmation of the financial arrangements with Heidtke; and it underscores the fact that GCBI does not now except to the ruling denying its enlargement petition, nor did it even reply to DG's opposition to the petition to enlarge. DG characterizes the current attempts to attack its financial qualifications by the previously dormant opponents (including GBC, since it previously sought only a financial certification issue) as "grossly late petitions to enlarge issues under the guise of exceptions." Reply at 13. It argues that the exceptors cannot claim that they are relying on newly discovered evidence (the test for reopening the record, *see Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988)) since all of the materials relied on were available before the hearing began. On the merits, DG asserts that Groden properly assembled estimates of the costs of construction and the initial three months of operation prior to the filing of the application and that she met several times with Gilbert, discussing orally cost estimates as well as background information relative to DG and its principals. It asserts that the release by Gilbert establishes that it had a legitimate loan commitment at the outset and that

the subsequent Sovran loan commitment letter belies on its face the allegations that the bank did not have sufficient evidence before it to make the loan.

DISCUSSION

8. The Board Chairman adheres to his view that the legal arguments set forth in the exceptions were never squarely raised before the ALJ. Nevertheless, the Board has now concluded that the underlying facts do raise substantial and material questions of fact regarding DG's financial qualifications that require a further evidentiary hearing. *See generally Marlin Broadcasting of Central Florida, Inc. v. FCC*, No. 90-1505 (D.C. Cir. January 7, 1992), Slip Op. at p. 14 (Board may *sua sponte* raise issues not properly presented by exceptions); *see also Dutchess Communications Corp.*, 101 FCC 2d 243, 245 n. 2 (Rev. Bd. 1985) ("It is particularly important that an applicant awarded a construction permit over competing applicants be found financially capable: otherwise the enormous cost of the hearing process to the competing applicants and to the public will have been wholly wasted, and the entire application process must be begun again, with the attendant delay of several more years before the initiation of a new broadcast service.") (subequent history omitted). Here, the ALJ did not reach the merits of the allegations relating to DG's arrangement with Heidtke/Gilbert in denying the request for a financial qualifications issue; he only implicitly found that the Sovran Bank letter effectively mooted the earlier allegations. Subsequent cases establish that this was error. In *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 paras. 3-6 (1990) (subsequent history omitted), the Commission held that an applicant's failure to demonstrate reasonable assurance of required funds on the date of certification warranted the applicant's disqualification. *See also Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991) (applicant could not rely on a modified financial proposal to meet a financial issue specified against it in the absence of a showing that it had reasonable assurance of necessary financing at the time it filed its application); *Shawn Phalen*, 5 FCC Rcd 2622 para. 4 (Rev. Bd. 1990) (appropriate inquiry is whether applicant had reasonable assurance at the time of certification). Although these cases were decided subsequent to the ALJ's ruling, there is no indication that they represented a change in policy, and, in fact, the certification in *Marlin* was executed in 1985; that is, prior to the certification in this proceeding. We turn to the arguments on the merits.

9. It is well settled that, although an applicant need not have a binding written agreement to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), the Commission does require a certification of such "reasonable assurance" of committed funding sufficient to construct the proposed facility and to operate for three months without revenue. Questions 1 and 2 of Section III, FCC Form 301, utilized by DG, clearly state:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment or credit; (b) it can and will meet all contractural requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

Moreover, the Commission enunciated in *Northampton Media Associates*, 4 FCC Rcd 5517 (1989) (subsequent history omitted), the showing required of applicants for demonstrating their financial qualifiations (4 FCC Rcd at 5518-5519) (emphases added):

> [A] broadcast applicant . . . must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months *before* the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 ¶ 11 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988).
>
> * * *
>
> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide *substantial and reliable evidence* showing "sufficient net liquid assets on hand, *or committed sources of funds* to construct and operate for three months without revenue . . . ."
>
> * * *
>
> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. *Where the lender is not a financial institution* but a person, as in this case, *the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time.* In such a case, we believe that a balance sheet or other documentary evidence (such as a financial statement) demonstrating that, at the time of certification, that person had sufficient net liquid assets to meet his financial commitment to the applicant would be clear evidence to support the certification. *See Armando Garcia*, 3 FCC Rcd 1065, 1066 ¶ 11 (Rev. Bd.), *review denied*, 3 FCC Rcd 4767 (1988) . . . .

10. Here, the deposition testimony initially raises a substantial question of fact whether the applicant had a meaningful commitment from Heidtke at the time of certification. Groden testified that, although she had not had any previous business dealings with Heidtke, she was never asked to provide to the putative lender financial statements of the DG principals, credit references, or documentation regarding her proposal to construct the station. In a similar situation (albeit involving a bank), the Board added an issue, citing as support *Christina Communications*, 2 FCC Rcd 1971 (1987), that where an applicant's individual qualifications were not considered by the lender, an inquiry was necessary to determine whether the loan commitment was more than an accommodation for the applicant. *Shawn Phalen*, 5 FCC Rcd at 54; *see also Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 para. 5 (1990) (subsequent history omitted); *REM Malloy Broadcasting*, 6 FCC Rcd 5843, 5845 para. 10 (Rev. Bd. 1991). Also, there was no written pledge of funding from Heidtke. Although Gilbert's declaration, appended to DG's oppositions to the petitions to enlarge issues, reflects that he "advised |Groden| that . . . sufficient funds would be made available . . . to meet the estimated costs of construction and operation," that declaration (as well as Gilbert's February 1989 "release" letter on the letterhead of National Life of Vermont) raise additional questions concerning the source of the loan: Heidtke or a third-party investor to be located subsequently by Heidtke or Gilbert. Gilbert stated in his declaration (emphasis added):

> As a financial consultant/investment broker, I have been responsible for arranging for the financing of various ventures, including the financing of companies similar to D.G . . .
>
> * * *
>
> . . . Approximately two years later, Ms. Groden advised me that D.G. had recently obtained a formal loan commitment letter from Sovran Bank. Since both she and I still understood that *our* December, 1986 *agreement was in effect*, we mutually agreed, and thereafter executed, a simple letter releasing both parties from any obligations arising from that earlier agreement.

Groden had also acknowledged at her deposition in response to a question concerning Heidtke, that she had heard of Heidtke as an entity that makes loan arrangements for businesses. She has also described Heidtke as a broker and a venture capitalist.

11. Assuming that Heidtke was to arrange financing through a third-party investor, DG's certification was suspect inasmuch as there does not appear to be any underwriting guarantee of the funding from the investment company should a private investor not be found, *see Charisma*, 5 FCC Rcd at 2916-2917 paras. 4, 7. Conversely, if Gilbert was personally responsible for arranging the funds (contrary to Groden's statement that he was speaking on behalf of Heidtke), as one might expect from the National Life of Vermont "release" letter prepared after Gilbert left Heidtke, it is difficult to comprehend the basis for Groden's certification that sufficient funds were on hand or *available from committed sources*. Additionally, if Gilbert's involvement was an integral part of a Heidtke loan, his departure would raise the question whether DG lost any reasonable assurance it may have had from Heidtke when Gilbert left Heidtke's employ. The uncertainties concerning Gilbert's relationship to the loan are further complicated by information disclosed in a request for official notice, filed by HSBC on December 23, 1991, that Gilbert had filed for protection under Chapter 11 of the Bankruptcy Code approximately six months after he provided DG with the loan commitment. In any event, it is unclear that Groden ever examined documentation of the putative lender or looked into the lender's background to ascertain the lender's ability to provide the loan. *See Aspen FM, Inc.*, 6 FCC Rcd at 1603 para. 8 (1991) (to meet burden under financial issue, applicant must demonstrate that it took necessary steps to ascertain that lender (not a bank) has sufficient financial resources to meet loan commitment); *Marlin Broadcasting*, 5 FCC Rcd at 5752 para. 10 & n. 8; *Charisma*, 5 FCC Rcd at 2917 para. 7. Finally, with respect to the bank, the failure of the applicant to supply the financial statements of its principals raises concern whether there was a meaningful loan commitment or a prospective lender's mere invitation to solicit an ordinary loan application at some later date. *See Shawn Phalen*, 5 FCC Rcd at 53-54 (Rev. Bd. 1990). Under the issue as specified, the inquiry should focus on whether DG was financially qualified at the time of certification, continued to remain qualified throughout the proceeding, and is qualified currently. The Board will further add a false certification issue against DG in light of the discrepancy between her failure to inquire into Heidtke's ability to provide the loan and her affirmative certification that she had determined that the source of funds had sufficient net liquid assets to meet the loan commitment.

LINDSEY CHRISTIAN BROADCASTING COMPANY

12. Inasmuch as this case must be remanded for other evidence on DG's financial qualifications, the Board will also permit an inquiry into the financial qualifications of Lindsey Christian Broadcasting Company (LCB), as requested by HSBC, in a motion to enlarge issues, filed August 1, 1990. HSBC's motion attached a copy of June 1990 filings by the principals of LCB seeking relief under Chapter 11 of the U.S. Bankruptcy Code. HSBC further notes in support of issues, that, although LCB assertedly was relying on a February 12, 1987 loan commitment letter from the First American National Bank of Nashville, Tennessee (First American), in June 1987, only four months after issuing its loan commitment letter, First American had filed a petition to deny the assignment of Station WHRP(AM), Portland, Tennessee, to LCB on grounds that LCB's principals may not be financially qualified to service the debt on that station. HSBC contends that LCB has never amended to report any change of its finances. In its opposition, filed August 24, 1990, LCB conceded that it did not currently have reasonable assurances of finances for its proposal but represented that it would promptly advise the Commission after it secured reasonable assurances of its finances. LCB, by amendment filed the same day, reported it believed on July 20, 1990, that it had secured reasonable assurance of funding, but after discussion with counsel, determined that the assurance did not meet Commission standards. LCB Petition to Amend, filed August 24, 1990. In addition, given LCB's earlier bankruptcy filing and the questions about its principals' financial condition going back to the 1987 First

American petition, the Board will add an issue to ascertain whether LCB intentionally failed to comply with the Commission's reporting requirements to conceal its lack of financial qualifications. *See generally David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991).

13. ACCORDINGLY, IT IS ORDERED, That the Motion to Reopen the Record and Enlarge Issues, filed August 1, 1990, by Heidelberg-Stone Broadcasting Company, IS GRANTED to the extent indicated herein; that the Petition for Leave to Amend, filed August 24, 1990, as supplemented on August 29, 1990, by Lindsey Christian Broadcasting Company, IS GRANTED, and its amendment IS ACCEPTED; that the Petition for Leave to Amend, filed October 2, 1990, by DG Enterprises, Inc. IS GRANTED, and its amendment IS ACCEPTED; that the Motion to Correct Oral Argument Transcript, filed December 13, 1990, by Goodlettsville Broadcasting Company, Inc. IS GRANTED and the transcript IS CORRECTED; and that the Request for Official Notice, filed December 23, 1991, by Heidelbert-Stone Broadcasting IS GRANTED to the extent indicated herein; and,

14. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and preparation of a Supplemental Initial Decision on the following issues:

1. To determine whether DG Enterprises, Inc. was, and has continued to be, financially qualified to be a Commission licensee; and,

2. To determine whether DG Enterprises, Inc. falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee; and,

3. To determine whether Lindsey Christian Broadcasting Company was, and has continued to be, financially qualified to be a Commission licensee; and,

4. To determine whether Lindsey Christian Broadcasting Company has failed to comply with the reporting provisions of Section 1.65 of the Commission's Rules, and, if so, the effect thereof on its qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-136

In the Matter of

DAVID R. PRICE

Licensee, Radio Station WOKJ(AM)
Jackson, Mississippi

Order to Show Cause Why the License
of Station WOKJ(AM), Jackson,
Mississippi Should Not Be Revoked

and

Notice of Forfeiture

Appearances

Susan L. Theall, Esq., on behalf of Respondent David R. Price; *Larry A. Miller, Esq.*, and *James W. Shook, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: February 20, 1992; Released: March 11, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Chief Administrative Law Judge Joseph Stirmer, *David R. Price*, 6 FCC Rcd 5734 (1991), which revoked the license of David R. Price for radio station WOKJ(AM), Jackson, Mississippi, and assessed a forfeiture of $20,000 against Price for, *inter alia*, failing to illuminate the WOKJ towers during periods of darkness. Price filed exceptions on November 8, 1991, and supplemented them on November 21, 1991.[1] The Mass Media Bureau replied on November 21, 1991, and supplemented its reply on December 4, 1991. For the reasons set forth below, we are affirming the ALJ's *Initial Decision*.

2. On May 14, 1990, the Commission released an order pursuant to Sections 312(a)(3), (4) and 503(b) of the Communications Act of 1934, as amended, directing Price to show cause why his license should not be revoked on the following issues:

(a) To determine whether David R. Price violated Sections 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), 17.48, 17.51 and 17.56(a) of the Commission's Rules.

(b) To determine whether David R. Price violated Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules.

(c) To determine whether David R. Price violated Sections 1.89 and 73.1015 of the Commission's Rules.

(d) To determine, in light of the evidence adduced under the foregoing issues, whether David R. Price possesses the requisite qualifications to be or remain licensee of the captioned radio station.

(e) To determine, in light of the evidence adduced under the foregoing issues, whether David R. Price should be assessed a monetary forfeiture not to exceed $250,000 and, if so, in what amount.

Order to Show Cause and Notice of Forfeiture, 6 FCC Rcd 2585, 2586, para. 8 (1991). The Commission further ordered that, whether or not the hearing record warrants revocation, a determination be made as to "whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended." *Id.* at para. 13. The Commission also ordered that the hearing be conducted on an expedited basis given the hazard to air navigation resulting from the licensee's apparent failure to illuminate his towers. *Id.* at para. 11.

BACKGROUND

3. The facts are set forth clearly in the *Initial Decision* and will be briefly summarized here. Price is the licensee of Jackson, Mississippi, Station WOKJ(AM), which has an antenna array with six 388-foot towers located about 2.5 miles north of the John Bell Williams Airport.[2] On July 20, 1990, when Mississippi Power and Light (MPL) discontinued service for nonpayment of the electric bill, the station went off the air, and from July 20 until December 21, 1990, the towers were not illuminated during periods of darkness. *Initial Decision* at 5734 paras. 5 - 7.[3]

4. Various Commission offices tried to contact Price in writing. The Engineer in Charge of the Commission's New Orleans Field Office wrote on August 22, 1990, to advise Price of an FAA report about his unlighted towers and of the seriousness of the hazard to air navigation this caused. The Engineer in Charge directed Price to correct the situation immediately and to respond in writing with-

[1] The Review Board had extended the time for Price's exceptions until November 21, 1991.

[2] Towers higher than 200 feet must be lit. FAA Advisory Circular 70/7460-1G cited in letter from FAA to David Price, Nov. 2, 1990. *Initial Decision* at 5737 para. 16. *See* 47 C.F.R. 17.7 requiring notification to the FAA of towers over 200 feet in height; 47 C.F.R. 17.26 specifying the type of lighting required for towers over 300 feet in height.

[3] MPL agreed to provide power after the Commission intervened, on condition that Price make periodic installments to pay his bill. *Initial Decision* at 5737 para. 17. Price testified at the hearing that the tower lights are on and that he is paying for the lights out of funds from Station KNEK, Washington, Louisiana. Tr. 97.

in three days. *Id.* at 5734-35 para. 7. Price did not respond directly, but he wrote to the Engineer in Charge on September 11, 1990, to advise him that "I am in contact with a buyer in California for WOKJ Radio.... I will make every effort to have this completed within one week." *Id.* at para. 8. The Chief of the Mass Media Bureau's Complaints and Investigations Branch wrote to Price on September 19, 1990, asking him to provide information within fifteen days and followed up with another letter on November 8. The Chief of the Antenna Survey Branch sent Price a Notice of Violation on November 7, 1990, and asked for information within three days. That letter emphasized the FAA's finding that the unlighted towers are a hazard to air navigation.[4] Price did not respond to these letters. *id.* at 5735-36 paras. 9-15. He wrote instead to the Commission's AM Branch on October 22, 1990, requesting an extension of time to remain silent. *Id.* at 5735 para. 11, which was granted until March 10, 1991, and he requested an additional extension of time on April 9, 1991. *Id.* at 5737 para. 18. He also had conversations about the lights with people in the Commission's New Orleans Field Office.

5. Price did not dispute that the towers were not lighted during periods of darkness. He claimed that he could not light them because he had run out of money after his financial backers for WOKJ and for KNEK/KNEK-FM in Washington/Opelousas, Louisiana, withdrew their support four months after going into operation in late 1988. *Id.* at 5738 para. 22. However, the ALJ noted from Price Ex. 4 that Price's principal backer had written checks to Price or WOKJ for $125,000 in 1989 and for more than $25,000 until June 1990. *Id.* at 5738 para. 23. Price testified he had hoped to solve the lighting problem by selling WOKJ to Joe Levi in California, as recited in his September 11 letter, but nothing came of that after the prospective buyer was seriously injured in an automobile accident. *Id.* at 5738 para. 22. In November or December, Price contracted to sell the station to a buyer from Texas found through a media broker. Tr. 37. Price "took no [other] steps whatsoever to restore illumination of the lights of the towers." *Initial Decision* at 5739 para. 33.

6. Price testified both that he did not receive any of the Commission's letters to him, and later that he may have received some of the correspondence. *Id.* at 5737 para. 20. Because Price had left WOKJ after it went off the air, the Commission sent letters to Price at Station WKPG(AM), a station then licensed to him at Port Gibson, Mississippi, which he visited periodically. He also was aware of the contents of the letters through conversations with the Commission's Field Operations Bureau in New Orleans.

7. The ALJ found that Price willfully and repeatedly violated section 303(q) of the Communications Act, and sections 73.1213, 17.21(a), and 17.51 of the Commission's Rules by failing to illuminate WOKJ's 388-foot towers from July 20 to December 21, 1990. He found that Price knew that he was required to maintain lighting and that Price knew that the tower lights were not on for that period. *Id.* at 5738-39 para 27. The ALJ found that Price violated section 73.1740(a)(4) of the Commission's Rules by willfully and repeatedly failing to maintain WOKJ's tower lights during the station's silence. *Id.* at 5739 para. 30. He also found that Price violated section 1.89(b) by failing to respond to the Commission's November 7, 1990, Notice of Violation. *Id.* at para. 32. Finally, he found that Price violated section 73.1015 with his September 11, 1990, letter by misrepresenting that the problem with the lights would be solved within a week and by failing to timely respond to other correspondence. *Id.*[5]

8. The ALJ concluded that Price's license for WOKJ should be revoked on the basis of the tower lighting violations alone. By failing to take any steps to restore the illumination other than attempting to sell the station, Price "created and permitted a potentially hazardous condition to air navigation to persist for a period of five months." *Id.* at 5739-40 para. 33. This plus Price's "cavalier attitude in failing to respond to Commission correspondence and a Notice of Violation" and his irresponsibility about the problem led the ALJ to hold that, "The Commission simply cannot rely on Mr. Price as a licensee, and his willful and repeated serious violations of the aforementioned statute and rules mandate the revocation of his license for WOKJ."[6] *Id.* at 5740 para. 34. After considering Price's arguments, past broadcast history, lack of prior violations, and ability to pay, the ALJ also concluded that Price should forfeit $20,000 for violating the tower lighting requirements of 47 U.S.C. 303(q) and 47 C.F.R. 73.1213, 17.21(a), 17.51, 73.1740(a)(4), and also the requirement that he respond in writing to the Commission's notice of viiolation in 47 C.F.R. 1.89, and the prohibition against misrepresentations in written responses in 47 C.F.R. 73.1015. *Initial Decision* at 5740 paras. 37, 39, 41.

MISREPRESENTATION

9. Price argues that the ALJ erred in finding that Price's September 11, 1990, letter to the New Orleans Field Office misrepresented his intentions to the Commission. He points to the ALJ's finding that he:

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[4] The FAA had sent Price its report finding his unlighted towers to be a hazard on November 2, 1990. Price did not seek FAA review of that air hazard determination.

[5] The ALJ found that the Mass Media Bureau met its burden of proof on these issues. He further found that the Bureau did not meet its burden of proof that Price violated section 17.48 by failing to notify the FAA that his tower lights were not illuminated. He found that section 17.56(a) requiring repair or replacement of equipment or lights is not applicable to the situation, so there was no violation of that provision. *Initial Decision* at 5739 para. 28. He also found that Price did not violate section 73.1750, which requires notice to the Commission in cases of permanent discontinuance of operations, because Price did not intend to discontinue operations permanently. *Id.* para. 30. In his exceptions, Price makes the point that he did notify the FCC that WOKJ was off the air, and he requested continued authority to remain dark. The ALJ found that Price appeared to have notified the FCC, so he found no violation of the notice requirement of section 73.1740(a)(4), but he found that Price did violate the requirement in section 73.1740(a)(4) that lighting be maintained during periods of station silence. *See Initial Decision* at 5739 para. 30.

[6] The Chief ALJ found:

> While Price received $300 per week from KNEK and KNEK-FM, which he turned over to his wife for deposit to her checking account, he failed to make any arrangements to pay the power company to illuminate the WOKJ towers.

Initial Decision at 5740 para. 34.

> created the false impression that the problem with the tower lights would be solved within one week. This statement was based on Price's belief that a buyer of WOKJ would restore the lights. But it is inconceivable that a long time and experienced broadcaster, such as Price, could have reasonably believed that a buyer could be found who, within a week, would restore the tower lighting of WOKJ. The statement had no basis in fact, was simply wishful thinking on the part of Price, and constituted a misrepresentation in violation of Section 73.1015 of the Rules.

Id. at 5739 para. 32. Price disputes the ALJ's finding because he had a letter of intent to buy the station from Joe Levi sent in July 1990, about the time the station went dark, and was working on the sale until Levi's automobile accident caused the sale to fall through.

10. The relevant question is whether, when Price wrote to the Commission's Field Office on September 11, 1990, he had any reason to believe that a sale to Levi or anyone could be completed and he would have money to restore the lights "within one week" as he had said in his letter.[7] *Initial Decision* at 5735 para. 8. Price has been vague about the dates and details of his contacts with Levi. He has offered no dates of conversations, no copies of correspondence, and no notes of conversations with Levi about the sale of the station to document when conversations took place. Price testified under oath:

> I shut the station down, and had been dealing with a man by the name of Joe Levi in California who had agreed to purchase the station. I have a document here, a letter of intent for the -- to show that in July of 1990 I had a letter of intent to sell the station. So when it did close down, I did not expect it to be off the air for any extended period of time.

Tr. 35. No 1990 letter of intent was introduced into evidence. Shortly after Price took the station off the air on July 20, 1990, "about a month I believe," Tr. 36, Levi had the automobile accident and was in the hospital for "probably a couple of months." *Id.* During that time, "I couldn't hear from him. I didn't know what had happened. I didn't know whether he had left the country or what had taken place." *Id.* This chronology of events from Price's testimony supports the conclusion that, when Price wrote to the Field Operations Bureau, he was not in touch with Levi. Thus, the ALJ drew the only conclusion supported by the record; *i.e.*, at the time of Price's letter to the Field Office, his "effort to have this completed within one week" was without factual basis, was just wishful thinking and intended to create the false impression that the lighting problem was about to be resolved.[8]

Because the truthfulness of the September 11 letter is at issue, Price's willingness to deal with a buyer brought to him by a media broker in November or December is irrelevant to the ALJ's finding of wishful thinking and misrepresentation in violation of 47 C.F.R. 73.1015.

[8] With regard to another issue, Price asked to Board to take official notice of the Commission's ownership file for KNEK without specifying what the Board should expect to find there. That file references the WOKJ ownership file, which contains an Asset Purchase Agreement entered into by Price and Joe Levi on July 24, *1989*. The Agreement showed that a broker was involved. It was filed with the Commission through counsel on September 5, *1989*. According to the transmittal letter:

> This Agreement was executed on July 24, 1989, and the parties contemplated that the Form 314 would be completed within the 30-day period required for filing this Agreement. However, due to unforseen delays the buyer has not yet completed his portion of the Form 314, and that document is not yet ready for filing. In order to remain in compliance with FCC rules (73.3613), David R. Price, as licensee of WOKJ, is filing this Agreement.

Letter from Ashton R. Hardy to Donna R. Searcy, September 5, 1989. Yet, in his testimony quoted above, Price described a July 1990 option from Levi. In his handwritten September 2, 1991, letter to the ALJ in which he put forth his case, Price said at pages 1-2:

> At the time I was forced to shut down I contacted a minority buyer in California and made a verbal agreement for him to buy WOKJ. The buyer began to make his financial arrangements. This dragged on for 2 or 3 months and then I could not contact him. About that time I found that he had been severely injured in an auto accident and had been in intensive care for most of the time I could not contact him.

His Exceptions advised the Commission:

> Price was working to get the sale to Levi closed when he wrote to the Commission on September 11, 1990. The proposed buyer was subsequently involved in an automobile accident and was in the hospital with a crushed chest for -- Price believed -- a couple of months.

Exceptions of David R. Price and Brief in Support, November 21, 1991, pages 2-3. (Price appeared *pro se* during the hearing. He had counsel for preparation of his exceptions.) Price's testimony and letter to the ALJ are inconsistent with each other, but all point to an attempt to sell the station to Levi in 1990 at the time the station went dark. The 1989 Asset Purchase Agreement raises a very serious question about whether Price had an understanding with Levi about the sale of Station WOKJ in July 1990, as he testified, or only in 1989 as reflected in the Agreement and, therefore, whether Price misrepresented his dealings with Joe Levi and, if so, whether he has the requisite qualifications to remain a Commission licensee in light of that misrepresentation. "As [the Commission has] stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifiying." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210 (1986) (subsequent history omitted). This Agreement is not on the record before the Board and its significance cannot be considered without a remand on a misrepresentation issue. Because we are affirming the ALJ's conclusion that Price's violations warrant revocation of his license, even assuming that he tried to sell the station to Levi during 1990 as he testified, we see no need to prolong this proceeding by pursuing the additional issue against Price.

WILLFULNESS OF VIOLATIONS

11. Price alleges that the ALJ erred in concluding that the violations were willful because compliance with the lighting requirement was impossible. He blames the tower light outage on "his financial distress" and argues that he did everything possible short of bank robbery to find funds to light the tower. Exceptions, Nov. 21, 1991, pages 5-6. For his conduct to be "willful, hence the basis of forfeiture or revocation," he says, "the Bureau had to have demonstrated that Price could have illuminated the tower lights. The Bureau has not demonstrated any source of cash or persuasion that was available to Price to get the lights turned on by the power company...." Exceptions, page 8.

12. Price misconstrues the definition of "willful" as used in sections 312(a) and 503(b) of the Communications Act.

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Communications Act of 1934, as amended, section 312(f)(1), 47 U.S.C. 312(f)(1).[9] If Price knew that the towers were not lighted, his failure to provide lighting was willful. *See Midwest Radio-Television Inc.*, 45 FCC 1137, 1141 (1963) (distinguishing willful from accidental acts). Price does not dispute the underlying facts upon which the ALJ made his finding of willfulness:

> The findings make clear, and it is undisputed, that during the period from July 20, 1990, to December 21, 1990, David Price, the licensee of Station WOKJ, did not illuminate the lights on WOKJ's six tower array, each tower being 388 feet in height. This conduct was in direct violation of Section 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), and 17.51 of the Commission's rules. Moreover, the failure of Price to illuminate the 388 foot towers of WOKJ during the extended period reflected in the findings constitute willful and repeated violations of the aforementioned statute and rules. Clearly, Price knew he was under an obligation to maintain proper tower lighting for WOKJ. He further knew that his tower lights were not on during the period July 20, 1990, to December 21, 1990.

Initial Decision at 5738-39 para. 27. *See Initial Decision* at 5734-37 (reflecting correspondence from the Commission and the Federal Aviation Administration regarding tower illumination); Joint Ex. 1; Tr. 37 (acknowledging conversations about the lights with Mr. Hawkins, the Commission's Chief Engineer in New Orleans); and Tr. 92-93 (acknowledging he knew the towers were not lit without being told by the FCC). The ALJ correctly found that Price's violations of the cited statutory and regulatory sections were willful.

13. Price's argument--that his failure to illuminate the towers cannot be willful if complying with the lighting requirement is impossible--confuses the finding of willfulness with factors affecting the exercise of the Commission's discretion in choosing an appropriate course of action in light of the violations. But, even if impossibility of compliance precludes a finding of willfulness, Price would have a heavy burden to show that compliance was indeed impossible. He has not met that burden. He takes exception to the ALJ's finding that he took no action other than trying to sell the station in *Initial Decision* at 5739 para. 33, but the only action he alleges is pleading with his backers and, after power was restored, paying the periodic electric bill with KNEK funds. The record shows that Price did plead with his backers "not to force me to shut the station down" at the time the power was being turned off. Tr. 35. But, he left the station when the backers decided to close it, *id.*, and went "to KNEK in Opolousas, Louisiana and went to work." Tr. 36. On December 20, 1990, after Mass Media Bureau Chief Roy Stewart personally called him about the seriousness of the lighting problem, he went back to his backers and said, "it's going to be a whole lot better for you to take a fussing over $3,000 than it is for you to take a fussing over $400,000 [their entire broadcast investment]. So, on that basis, they finally wrote me a check. I got the lights back on and Mr. Stewart was rather direct due to the consequences of what he thought had happened." Tr. 38.[10] From that point on, Price paid the electric bill with KNEK funds. Tr. 97. There is no evidence that he approached the backers specifically about the electric bill before the power was shut off or approached them at all about the lighting problem between the time the station was closed and Roy Stewart's telephone call. There also is no evidence that he approached the power company about making arrangements for lighting the towers or considered any other alternatives, such as a generator, to

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[9] When Congress added section 503(b) to the Communications Act in 1960, it chose to describe violations as "willful or repeated" as that phrase was used in section 312. The phrase "has a fixed meaning in the Communications Act and it has been interpreted by the Commission and courts a number of times. In your committee's opinion, it would be unwise at this time to introduce an entirely new concept for determining a licensee's responsibility for a violation." S. Rep. No. 1187, 86th Cong., 2d Sess. (1960), *reprinted in* RR Finding Aids para. 10:1114. *See Midwest Radio-Television, Inc.*, 45 FCC 1137, 1139-41 (1963) (defining a "willful" violation of sec. 503(b) on the basis of the Senate Report and Commission and court cases.) When Congress added the definitions of "willful" and "repeated" to section 312 of the Communications Act in 1982, it said in its Conference Report, "The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's applicaton of those terms in Midwest Radio-Television, Inc., 45 FCC 1137 (1963)." Rep. No. 765, 97th Cong., 2d Sess. (1982), *reprinted in* RR Finding Aids para. 10:1260. According to the report, "'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law." *Id.*

[10] Cappaert Enterprises' list of disbursements for WOKJ and KNEK shows a check to Mississippi Power and Light for $771.48 on December 26, 1990. Price Ex. 4, page 3.

restore the lights. There is evidence, however, that Price transferred a house he owned to his wife's name when he saw the problems coming. Tr. 81. Price gave the proceeds of the sale of his Fort Gibson station to his wife for deposit into her personal checking account, Tr. 70, and he gives her whatever money he gets, Tr. 72, including money he earns from working at KNEK. Tr. 79. The ALJ's finding that Price did nothing about restoring the lights other than trying to sell the station is supported by a preponderance of the record evidence for the period covered by the violations.[11] *See generally Washington's Christian Television Outreach*, 99 FCC 2d 395, 401 para. 8 (Rev. Bd. 1984) (valid factual findings are entitled to Board deference unless the record supports a contrary result), *review granted in part on other grounds and denied in part*, 59 RR 2d 787 (1985), *recon. denied*, 59 RR 2d 1679 (1986), *aff'd by judgment*, No. 85-1649 (D.C. Cir. Dec. 17, 1987). *See also Radio Beaumont, Inc.*, 13 FCC 2d 965, 965-66 (1968) (Commission rejected licensee's argument that he could not find anyone to climb the tower to replace a light); *Mid-Atlantic Broadcasting Company*, 6 FCC 2d 739, 740 (1967) (Commission rejected argument that problems with tower painting were beyond the licensee's control where licensee wanted painting done at its own convenience and on its own terms). *Cf. Bernadine H. Layne*, 2 FCC Rcd 2506, 2507 (1987) (unavailability of funds is not considered a circumstance "beyond the control" of a permittee and does not justify extension of construction permit).

14. The ALJ found that the violations were repeated as well as willful, and Price has not excepted to this finding. "Repeated" as defined in 47 U.S.C. 312(f)(1) "means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." Thus, each day that Price did not illuminate his towers during periods of darkness is a separate violation. Because the same consequences attach to repeated violations as to willful ones, *see* 47 U.S.C. 312(a)(3), (4); 47 U.S.C. 503(b)(1)(A), (B), the results here would be the same even if the ALJ's finding of willful violations were in error.

RESPONDING TO COMMISSION CORRESPONDENCE

15. Price also excepts to the ALJ's findings that he repeatedly ignored Commission correspondence and did not attempt to respond to Commission inquiries, *Initial Decision* at 5739 para. 32, and that he demonstrated a "cavalier attitude in failing to respond to Commission inquiries." *Id.* at 5740 para. 34. These findings are supported by a preponderance of the record evidence. Price responded indirectly to the August 22, 1990, letter from the New Orleans Field Office, which asked for a response within three days, with his September 11, 1990, letter promising every effort to get the station on the air and the lights back on with the help of a potential purchaser. *See Initial Decision* at 5734-35 paras. 7-8. He stipulated that he did not respond as directed to letters from the Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, dated September 19, 1990, and November 8, 1990, and to the notice of violation from the Chief, Antenna Survey Branch, dated November 7, 1990. Joint Ex. 1. *See Initial Decision*, pages 5735-5736 paras. 9-15. In his defense he argues that he was in telephone contact with the New Orleans Field Office and could not afford legal counsel to answer Commission inquiries properly. But, this begs the question. His obligation as a Commission licensee is not conditioned on having counsel. *Cf. CSJ Investments, Inc.*, 5 FCC Rcd 7653, 7654 para. 12 (1990)(an applicant acting without counsel must conform with Commission rules and procedures); *Classic Vision, Inc.*, 104 FCC 2d 1271, 1273 (Rev. Bd. 1986)(an applicant cannot escape the consequences of his acts by shifting responsibility to counsel), *review denied*, 2 FCC Rcd 2376 (1987). The attitude reflected in his unilateral decision to respond to inquiries from Commission offices in Washington through telephone contact with the New Orleans Field Office is consistent with the ALJ's characterization as "cavalier."

16. Price also argues that the letters were sent to his station at Port Gibson, Mississippi, while he was at KNEK/KNEK-FM in Washington, Louisiana. But, as he himself has acknowledged, the correspondence was sent to a facility licensed to him, and "I may have gotten some of these," Tr. 94. Furthermore, Price has an affirmative obligation as a licensee to "furnish the Commission with an address to be used by the Commission in serving documents or directing correspondence to that licensee." Section 1.5 of the Commission's Rules, 47 C.F.R. 1.5. The Commission acted reasonably in expecting that correspondence sent to him at a station licensed to him would, in fact, reach him. Indeed, section 1.5(b) makes clear that "[t]he licensee is responsible for making any arrangements which may be necessary in his particular circumstances to assure that Commission. . . correspondence delivered to this address will promptly reach him or some person authorized by him to act in his behalf." After learning of the Commission's first letter to him in Port Gibson, Price, at a minimum, should have instructed his staff there to be sure that any future Commission correspondence would be called to his attention and forwarded to him immediately. Price also should have sent the Commission notice about where to send official correspondence to him. His failure to ensure receipt of Commission correspondence and his reliance on the Commission's use of his Port Gibson address as a reason not to respond to Commission correspondence as directed simply reinforces the ALJ's finding that he was cavalier about Commission correspondence as well as inattentive to his responsibilities as a licensee.

FORFEITURE

17. Price further argues that the fine imposed on him is unjust because it is a far more severe penalty than that imposed in the case of David Stiles. Price complains that Stiles was merely ordered to dismantle an unlighted 755 foot tower after the electric company ceased supplying power while Price's license is being revoked and he is being fined $20,000. The situations are distinguishable, however, because Stiles was not a Commission licensee and no other licensees were using the tower. *FCC Orders Dismantlement of Radio Tower Located in Manchester, TN*, Report No. GN-81 (News Release, Nov. 1, 1991) (copy

[11] See discussion *supra* n.8 of possibility that his effort to sell the station to Levi was in 1989 rather than 1990.

attached to Mass Media Bureau's Reply to Exceptions of David R. Price, Nov. 21, 1991). Furthermore, after receiving the FAA hazard determination, the owner had placed lights on the tower, although the lighting did not comply with FCC requirements. Mass Media Bureau's Reply to Exceptions, page 8. Under section 303(q) of the Communications Act, 47 U.S.C. 303(q), the Commission can order an owner to dismantle a tower that is no longer licensed for radio communication and is no longer lighted and painted as prescribed by the Commission's Rules, if the FAA administrator has determined that it may be a menace to air navigation. The Commission also could have fined that tower owner under section 503(b)(5) of the Communications Act, after giving the warning and opportunity to come into compliance required for nonlicensees, but it chose to address the problem directly because of the air navigation problem.[12] In this case, Price has insisted that he wants to return the station to the air. The Commission repeatedly contacted Price and warned him that the Commission could assess a forfeiture for his failure to illuminate the WOKJ towers, but he took no constructive action about the lighting until Mass Media Bureau Chief Roy Stewart's intervention in December, 1990. Given the disparate circumstances, the ALJ's forfeiture order in this case was not arbitrary or capricious.

18. Price also argues that revocation should be punishment enough because Price has no history of prior offenses despite his long history in broadcasting and because he simply does not have the ability to pay. When the ALJ fixed the amount of the fine, he noted that Price has an agreement to sell KNEK/KNEK-FM, which will eliminate the "vast majority of Price's claimed liabilities." *See Initial Decision* at 5741 n.3. Price says that the buyer has not paid the liabilities, and he asks that the Board take official notice of the KNEK ownership file without indicating what information the Board should expect to find there.[13] The Board should not have to depend on mental telepathy to discern the basis for Price's exception. Nonetheless, it appears that the Commission has yet to act on his applications to transfer KNEK and KNEK-FM from David R. Price and Dee Broadcasting, Inc., respectively, to James H. Dulaney. The Contract of Sale with Dulaney (Price Ex. 5) provides that liabilities, including a major note held by Price's primary backer (Bureau Ex. 1), are transferred to Dulaney, but under the Communications Act and Commission rules, the sale cannot be consummated until approved by the Commission. The ALJ is correct in saying that the sale should eliminate most of Price's liabilities once the transfer applications are granted.

19. The maximum forfeiture possible for Price's failure to illuminate his towers for five months is $250,000. After taking into consideration the criteria specified in 47 U.S.C. 503(b)(2) for assessing forfeitures, the Commission's guidance in *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, and the factors in 47 C.F.R. 1.80(b)(4), including Price's history as a broadcaster, his lack of prior violations, his ability to pay, and the seriousness of the offense, the ALJ issued a forfeiture of $20,000, the amount recommended in the Commission's *Standards* for a single violation of the lighting requirements. *See Initial Decision* at 5740 paras. 35-39. This amount is consistent with the relevant statutory and Commission criteria.

DISTRESS SALE

20. Finally, Price argues that the ALJ should have explained the distress sale procedure to him, suspended the hearing, and given him a few days to file his plans to sell the station pursuant to the Commission's minority distress sale policy set forth in *Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, *clarified*, 44 RR 2d 479 (1978), *supplemented*, 91 FCC 2d 512 (1982). Under this policy a licensee facing a revocation hearing may elect to seek to assign the license to a minority-owned entity at no more than 75 percent of the appraised market value of the station, *see Grayson Enterprises, Inc.*, 77 FCC 2d 156, 164 (1980), if the election is made before the start of the hearing. *See Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981). At the prehearing conference on June 18, 1991, Price was represented by counsel who discussed with the ALJ the various alternatives available to Price, including a distress sale. Tr. 14. Counsel clearly understood that a distress sale must be elected before the start of the hearing and said he was scheduled to speak with Price that day. The ALJ admonished counsel to advise Price that any distress sale election be made promptly and that the ALJ be notified immediately of such an election. Tr. 20-22. The ALJ did not err in refusing to disrupt the hearing for Price's late expression of interest in a distress sale.

CONCLUSION

21. Price has stipulated that he did not illuminate his towers during periods of darkness for five months and that he did not answer the Commission's September 19 and November 8, 1990, correspondence and the Commission's November 7, 1990, Notice of Violation as directed. Joint Ex. 1. The only factual dispute goes to the extent of Price's efforts to find a way to restore the tower lighting and whether Price misrepresented the likeliheed of a speedy restoration of the lights in his September 11, 1990, letter to the New Orleans Field Office, points which have been resolved against Price. Price's real concern is with the conclusions drawn from the record--that his violations warrant both revocation and a fine--particularly in light of his argument throughout this proceeding that his derelictions are due to financial problems beyond his control. Price would like to retain his license and pay no fine. But, "[i]f the Commission does uphold the license

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[12] The Bureau commented that Price could have turned in his license for WOKJ and possibly been relieved of further liability for the towers. This assumes that the towers were repossessed by the former licensee who had sold the station to Price. Price was uncertain whether the towers were part of the physical assets he acquired when he bought WOKJ and whether they had been repossessed pursuant to the former owner's judgment against Price. Tr. 74-76. The 1989 Asset Purchase Agreement with Levi, at Ex. A, includes "Six brovelcast [sic] tower 388' each" in the list of "personal property, fixtures and real estate shown on the books of Seller and utilized in the operation of said broadcast property."

[13] The KNEK/KNEK-FM ownership file contains a report showing James H. Delaney's acquisition of 49 percent of the stock in the AM and FM stations filed March 11, 1991. It also contains a copy of the 1989 Collateral Real and Chattel Mortage and the Collateral Mortgage Note that were received in evidence as Bureau Ex. 1.

revocation, revocation should be punishment enough." Exceptions of David R. Price, Nov. 21, 1991, p. 9. The Mass Media Bureau continues to support both revocation and forfeiture.

22. The Commission does not lightly revoke licenses, and it has not revoked licenses in the past for lighting violations. *See, e.g., Oro Spanish Broadcasting Co., Inc.*, 5 FCC Rcd 833 (station fined for lighting violation), *recon. denied*, 5 FCC Rcd 5500 (1990); *Garvin County Broadcasting, Inc.*, 46 FCC 2d 954 (1974)(same). But, in a June 12, 1989, *Public Notice* issued to alert licensees to the seriousness of tower lighting violations, the Commission also alerted licensees that appropriate action for violations could include "issuance of fines and/or revocation of the station license." *Air Hazards Caused by Improperly Marked and Lighted Communications Towers*, 66 RR 2d 924 (1989). The Commission was concerned about reports of aircraft collisions with unlighted or improperly lighted towers.

23. In considering whether to revoke Price's license, the Board must look to the record as a whole and make a judgment about his fitness to continue as a licensee. An important consideration is whether the Commission can rely on him to maintain lighting for the WOKJ towers and deal openly with the Commission about the lights once this proceeding is concluded. We think it cannot on the record here. Although warned repeatedly by the FAA and the Commission that his failure to light his six tower array only two and one-half miles from an airport was a serious hazard to air navigation, Price's response to the problems at WOKJ was to leave the station, work at KNEK and, as the ALJ noted, hide his assets. Nothing in the record suggests that Price made any effort to restore the lights after initially asking his backers to keep the station in operation when MPL turned off the power. Indeed, all the effort he claims is that he continued to offer the station for sale. For five months airplanes using the nearby airport were endangered during periods of darkness. Price says he should be commended for not hiding behind the limited liability of a corporate organizational structure. But, this is disingenuous at best because Price has been hiding behind his financial problems throughout this proceeding, and his business structure does not diminish the risk to life and property he created. Price expects to be relieved of the burdens of his responsibility as a licensee because of his finanical distress. As the ALJ said, his conduct has been "irresponsible and reckless." *Initial Decision* at 5740 para. 33. Price says that, after the Commission intervened with the power company in December 1990, he has continued to pay MPL with KNEK funds, Tr. 97, but he has applications pending to transfer KNEK/KNEK-FM to someone unconnected with WOKJ. He has made no commitment on the record here to provide lighting for WOKJ if he does not have the KNEK resources available, and we have no confidence that he will do so.[14] Price seems so removed from the WOKJ situation that he is not even sure whether the towers have been repossessed by the former owner. Tr. 74-76. On the basis of the record in this proceeding, we agree with the ALJ." The Commission simply cannot rely on Mr. Price as a licensee, and his willful and repeated serious violations of the [Communications Act] and [Commission] rules mandate the revocation of his license for WOKJ." *Initial Decision* at 5740 para. 34. Price's failure to respond to Commission correspondence and the misleading response in his September 11 letter reinforce that conclusion. *Cf. Virginia Metronet, Inc.*, 5 FCC Rcd 740 (1990) (cellular licensee agreed to contribute $1,000,000 to the United States Treasury, abide by company procedures for ensuring compliance with FCC rules for tower lighting and marking, and conduct an antenna lighting and marking safety educational and awareness campaign directed to the cellular industry); *Oro Spanish Broadcasting Co., Inc., supra* (licensee fined for lighting violation with respect to 205 and 217 foot towers although, after notice of liability from FCC, it received FAA letter saying that elimination of its lighting does not have an adverse impact on air navigation). In addition, because of the seriousness of Price's violations, a forfeiture in the amount of $20,000 as ordered by the ALJ is warranted. This directly addresses Price's violations and should serve notice on other licensees that disregard for tower lighting requirements will not be tolerated.

24. ACCORDINGLY, IT IS ORDERED That the license of David R. Price for radio station WOKJ(AM), Jackson, Mississippi, IS REVOKED.

25. IT IS FURTHER ORDERED That this Decision shall constitute an Order of Forfeiture in the amount of $20,000.[15]

Such payment SHALL BE SENT to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

This payment should indentify the payor and reference the control number of the Notice of Apparent Liability (NAL) or the Notice of Forfeiture (NOF). In this instance, the NAL control number is FCC 91-138, and the

[14] In reaching his conclusion that Price cannot be relied on to comply with the law, the ALJ noted that, "Price has failed to file tax returns with the Internal Revenue Service for himself or his companies for the years 1989 and 1990. This followed the imposition of a substantial monetary penalty in 1986 for failing to comply with federal tax laws." *Initial Decision* at 5741 n. 3. *See* Tr. 80-85.

[15] The Secretary of the Commission SHALL SEND a copy of this Decision by *Certified Mail -- Return Receipt Requested* to:

David R. Price
P.O. Box 598
Washington, Louisiana 70589

with a copy to:

Susan L. Theall
Attorney at Law
515 S. Court Street
Opelousas, LA 70570

control number of the NOF is FCC 91D-51. These references SHALL BE PLACED directly on the check. A separate piece of paper is not required.[16]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[16] In the event an application for review is not filed with the Commission within 30 days after the release of this Decision pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. 1.115, and the Commission does not review the case on its own motion, this Decision shall become effective 40 days after its public release pursuant to Section 1.117 of the Commission's Rules, 47 C.F.R. 1.117.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-406

In re Applications of

PENSACOLA RADIO PARTNERS	File No. BPH-880323MJ
VERNON C. FLOYD	File No. BPH-880324MK
MIRACLE RADIO, INC.	File No. BPH-880324NU
DAVID EARLE HOXENG d/b/a ADX COMMUNICATIONS OF PENSACOLA	File No. BPH-880324OJ

For Construction Permit for a
New FM Station on Channel 254C2,
Pensacola, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1992; Released: March 10, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE

1. Before the Review Board is a Petition for Extraordinary Relief filed by Vernon C. Floyd on January 9, 1991. Floyd asks that the Board vacate the ruling of Administrative Law Judge John M. Frysiak in *Memorandum Opinion and Order*, FCC 91M-3394, released December 5, 1991, which denied Floyd's Motion for Summary Decision on site availability and false certification issues. Floyd further asks that the Board grant Floyd's Motion for Summary Decision. According to Floyd, the site availability issue must be decided in his favor as a matter of law under *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 (1991), because he amended his application to specify his current site within the time allowed for amendments as a matter of right, and the false certification issue must be resolved in his favor on the basis of affidavits he submitted with his motion. Floyd sought and was denied permission to appeal by the ALJ. Pensacola Radio Partners opposes the Petition.

2. The ALJ's ruling does not deny or terminate Floyd's right to participate as a party in this proceeding, or provide any other basis for appeal as a matter of right under 47 C.F.R. 1.301(a). Thus, under 47 C.F.R. 1.301(b), Floyd may not file an interlocutory appeal of the ALJ's order denying his summary judgment motion without the ALJ's permission. The ALJ's disallowance of Floyd's request for permission to appeal is final, *id.*, and Floyd's petition therefore will not be entertained unless Floyd can show "that there has been such a flagrant abuse of [the ALJ's] discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo;* or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communications Satellite Corporation*, 32 FCC 2d 533, 534 para. 4 (1971); *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6156 para. 7 (1989); *Catalina Radio*, 4 FCC Rcd 8351 (Rev. Bd. 1989). Although summary decision could avoid inconvenient witness travel, as Floyd argues, *see Summary Decision Procedures*, 34 FCC 2d 485, 486 (1972), the burden of participating in a hearing on the substantive issues is not a sufficient reason for overruling the ALJ here. Floyd's argument that *Great Lakes* controls at least one of the two issues designated against him does not show that the ALJ has flagrantly abused his discretion in denying Floyd's motion or that public interest concerns cannot be protected. The ALJ has discretion under 47 C.F.R. 1.248 to fashion procedures for direct and rebuttal cases that minimize the need for oral testimony, if such is appropriate under the circumstances. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 162 para. 36, 171 n.21 (1990), *partial reconsideration granted on other grounds*, 6 FCC Rcd 3403 (1991). Floyd will have an opportunity to present his best case on the issues.

3. ACCORDINGLY, IT IS ORDERED That the Petition for Extraordinary Relief filed January 9, 1992, by Vernon C. Floyd IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Cargo Vessel
Kodiak Enterprise
Owned and Operated by
Kodiak Enterprise, Incorporated
Seattle, Washington

and her Masters

Jim Thill and James C. Cox

NOTICES OF APPARENT LIABILITY

Adopted: February 24, 1992; Released: March 9, 1992

By the Commission:

I. INTRODUCTION

1. These are Notices of Apparent Liability for Monetary Forfeiture issued pursuant to Section 364 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 362, to the owners and the masters of the Cargo Vessel Kodiak Enterprise. The vessel, Kodiak Enterprise, was navigated in the open sea on 31 days during the period February 20, 1991, to March 23, 1991, without an annual inspection by the Commission in violation of Section 362 of the Act, 47 U.S.C. § 360.

2. The master of the vessel from February 20, 1991, to 0500 hours on March 6, 1991, was Jim Thill. During that period the vessel navigated on the open sea on 15 days. The master of the vessel from 1330 hours on March 6, 1991, to March 23, 1991, was James C. Cox. During this time the vessel was navigated on the open sea on 16 days.

II. BACKGROUND

3. The Kodiak enterprise is a U.S. Cargo Vessel of 1,584 gross tons, call sign WAF5936, and is subject to the radiotelephone equipment provisions of the Communications Act. It must be inspected at least once each year by the Commission. 47 U.S.C. § 360(b). The vessel may not be navigated in the open sea without meeting the requirements of Title III, Part II of the Act. 47 U.S.C. § 351(a)(1).

4. The following are the pertinent events:

August 28, 1989 - the Kodiak Enterprise is inspected.

May 18, 1990 - the Commission's Anchorage field office receives a request to inspect the vessel at Dutch Harbor, Alaska, in August.

May 22, 1990 - The Anchorage field office responds and advises that an inspector would be in Dutch Harbor in August.[1]

July 27, 1990 - The Anchorage field office is advised by Kodiak Enterprise, Inc., the licensee of the Kodiak Enterprise, that the vessel cannot be in Dutch Harbor in August. The licensee requests an extension of the interval in which inspection is required.

The Anchorage Engineer-in-Charge grants an extension until January 28, 1991, pursuant to delegated authority. See 47C.F.R. §0.314(e)(3).

October 15, 1990 - the Anchorage field office reminds the licensee of the need for inspection and advises that an inspector would be in Dutch Harbor from February 4 to 7, 1991.

January 26, 1991 - The Kodiak Enterprise leaves Dutch Harbor for the fishing grounds.

January 28, 1991 - The extension expires while the vessel is at sea. Inspection is now due.

February 4 to 7 - Inspections conducted by the Commission in Dutch Harbor.

Week of February 11, 1991 - the Anchorage field office receives a request for the vessel to be inspected on February 17, 1991.

The Anchorage field office responds by letter and by telephone, notifying the licensee that the February request for inspection cannot be accommodated, but that an inspector would be in Dutch Harbor on February 21.

The licensee is advised that failure to comply with the requirements of the Act may result in a monetary forfeiture.

February 17, 1991 - the vessel returns to Dutch Harbor.

February 20, 1991 - the vessel departs Dutch Harbor for the fishing grounds in violation of Section 364 of the Communications Act.

February 21, 1991 - the Commission conducts inspections in Dutch Harbor.

[1] Dutch Harbor is in the Aleutian Islands, 850 air miles from Anchorage.

March 6, 1991 - 0500 hours -- the vessel returns to Dutch Harbor.

1530 hours -- the vessel departs Dutch Harbor for the fishing grounds.

March 14, 1991 - the vessel returns to Dutch Harbor.

March 16, 1991 - the vessel departs Dutch Harbor.

March 23, 1991 - the vessel arrives in Seattle.

March 29, 1991 - the vessel is inspected.

5. Section 364 of the Act specifies that "any ship of the United States that is navigated outside of any harbor or port in violation of any of the provisions of this part... shall forfeit to the United States the sum of $5,000... each day during which such navigation occurs shall constitute a separate offense." 47 U.S.C. §362(a). It further specifies that "Every willful failure on the part of the master of a ship of the United States to enforce or comply with the provisions of this Act... shall cause him to forfeit to the United States the sum of $1,000." 47 U.S.C. § 362(b).

6. The forfeiture provisions of Section 1.80(a) of the Rules, 47 C.F.R. § 1.80(a), make the notice of apparent liability provisions of Section 1.80(f) of the Rules, 47 C.F.R. § 1.80(f), applicable to forfeitures imposed under Section 364 of the Act.

III. DISCUSSION

7. The vessel was navigated in the open sea on the dates in question. The acts of the masters to leave port and remain in the open sea on those dates are willful acts. The Kodiak Enterprise was in violation of Section 362 of the Act for 31 days (February 20 - March 14, and March 16 - March 23). The statutory forfeiture amounts for navigation without an annual inspection are $1,000 for a ship master and $5,000 per day for a ship owner. 47 U.S.C. § 362. For the two ship masters here, there appears to be no basis for mitigation or adjustment, so we are issuing an NAL to each for $1,000. *See* 47 U.S.C. § 504; *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*. For the ship owner, the statutory forfeiture amount is $5,000 per day.[2] When an inspection certificate expires while a vessel is at sea, our policy is not to assess a forfeiture for the period between the expiration of the certificate and the vessel's arrival in port. In light of this fact and consistent with Section 504 and the discretion which we expressly reserved in the *Policy Statement*, we are issuing an NAL for $50,000 against the ship owner.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 364(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 362(a), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the vessel Kodiak Enterprise IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $50,000 for navigation in the open sea from February 20, 1991, to March 14, 1991, and from March 16, 1991, to March 23, 1991, without having an annual inspection as required by Section 362(b) of the Communications Act of 1934, as amended, 47U.S.C. § 360(b). IT IS FURTHER ORDERED, pursuant to Section 364(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 362(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the master of the vessel Kodiak Enterprise from February 20 to March 6, 1991, Jim Thill, IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $1,000 for navigation in the open sea without having without having an annual inspection in willful violation of Section 362(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 360(b).

9. IT IS FURTHER ORDERED, pursuant to Section 364(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 362(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that the master of the vessel Kodiak Enterprise from March 6, 1991, to March 23, 1991, James C. Cox, IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $1,000 for navigation in the open sea without having an annual inspection in willful violation of Section 362(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 360(b).

10. IT IS FURTHER ORDERED that the Secretary shall send by certified mail a copy of these Notices of Apparent Liability to Monetary Forfeiture to each of Kodiak Enterprise, Inc.; Jim Thill; and James C. Cox at Fishermen's Center, Fishermen's Terminal, P.O. Box 79021, Seattle, Washington 98119.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] We clarify that the $5,000 base amount listed in our *Policy Statement* for a ship owner's violation of ship radio requirements is, consistent with the Act, $5,000 per day. Similarly, the base amount listed for a ship owner's violation of the Great Lakes Agreement is $500 per day.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-12

In re Applications of

JOHN D. BOMBERGER File No. BPH-891026MC

COMMONWEALTH AUDIO VISUAL ENTERPRISES, INC. File No. BPH-891026MT

For Construction Permit for a
New FM Station on Channel 277A
in New Market, Virginia

Appearances

George R. Borsari, Esq. and *Anne Thomas Paxson, Esq.* on behalf of John D. Bomberger; *Mark J. Prak, Esq.* on behalf of Commonwealth Audio Visual Enterprises, Inc.; *Charles Dziedzic, Esq.* and *Robert Zauner, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: February 24, 1992; Released: March 9, 1992

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of two applicants:[1] John B. Bomberger ("Bomberger") and Commonwealth Audio Visual Enterprises, Inc. ("Commonwealth"). These two applicants are competing for the award of a Commission permit to construct a new FM Station on Channel 277A at New Market, Virginia.

2. The *Hearing Designation Order* ("*HDO*") DA 91-127, released February 12, 1991, reported at 6 F.C.C. Rcd 880 (MM Bur. 1991) and published at 56 Fed. Reg. 6669 (released February 19, 1991) sets the standard comparative issues for adjudication as follows:

> (a) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

The party applicants have the burdens of proving their proposals by a preponderance of the evidence. *Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). *Knoxville Broadcasting Corp.*, 103 F.C.C. 2d 669, 687 (Review Bd 1986). *See also Steadman* v. *SEC*, 450 U.S. 91 (1981).

3. In the course of this proceeding, the following issues were added by the Presiding Judge against Bomberger:

> (c) To determine whether John D. Bomberger was financially qualified on October 26, 1989 when he certified affirmatively to his financial qualifications on Form 301;
>
> (d) To determine whether John D. Bomberger misrepresented or lacked candor in certifying that he was and is financially qualified to construct and operate for three months; and
>
> (e) To determine, under the evidence adduced whether John D. Bomberger is qualified to receive a Commission license.

Memorandum Opinion and Order, FCC 91M-2503, released August 13, 1991.[2]

4. The trial on the standard comparative issue and the added qualifying issue against Bomberger was held on October 15, 16 and 17, 1991.[3] The record on all issues was closed on October 17, 1991, except that the parties were granted until October 28, 1991, to recall Mr Jack Steil, the bank official who testified on the added financial issues. *See* FCC *Order* FCC 91M-3108, released October 21, 1991. Mr. Steil never returned to the witness stand. The parties were directed to file Proposed Findings of Fact And Conclusions Of Law ("PFC") on December 2, 1991, and Reply Proposed Findings Of Fact And Conclusions Of Law ("RPFC") on December 20, 1991. (*Id.*)

5. Commonwealth was required to amend its engineering to relocate its antenna site on September 30, 1991. The engineering amendment was necessitated by action taken by the Commission in an unrelated frequency allotment that caused an unforeseen short-spacing in Commonwealth's first site. *See Crozet and Dilwyn* (DA 91-1073), 6 F.C.C. Rcd 5159 (MM Bur. 1991). Commonwealth's petition was granted and the engineering amendment was accepted on October 17, 1991. *See Memorandum Opinion and Order*, FCC 91M-3109, released October 25, 1991.[4] The amendment also mooted the comparative coverage issue which was stipulated out of the case on the first day of trial. (Tr. 7-18.) Since the Bureau was participating in only the comparative coverage phase, there were no Bureau PFC or RPFC filed.

FINDINGS OF FACT

6. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues remaining for trial wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325 U.S. 327, 333 (1945); *U. S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Standard Comparative Issue

7. The matters for determination under the standard comparative issue are which of the integration proposals would, on a comparative basis, best serve the public interest | *HDO* at Para. 7(2)|; and, in light of the evidence adduced relating to that issue, which of the applications

should be granted [*HDO* at Para. 7(3)].[5] *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Diversification

8. Commonwealth is licensee of Stations WRAA(AM) and WLCC(FM) at Luray, Virginia. Commonwealth has timely committed to divest itself of the Luray broadcast stations if it is awarded the construction permit for the New Market FM facility. (Commonwealth Exh. 1, Cave, Tr. 365.)

9. Commonwealth's president and sole shareholder, J.D. Cave, is employed as general manager of the Luray radio stations. He is committed to resign from those positions in the event Commonwealth receives the grant. (Commonwealth Exh. 1; Cave, Tr. 365.)[6]

10. John D. Bomberger does not own an attributable interest in any medium of mass communications. (Bomberger Exh. 1.)

Best Practicable Service

John D. Bomberger

Proposed Integration

11. Bomberger has applied as an individual. He resides in Ansora, Colorado. He is committed to move to a location within the station's city-grade service contour. (Bomberger Exh. 1.)

12. Bomberger's mother, Ms. Marcita Pereyo Bomberger, was born in Humacao, Puerto Rico and was a resident of Puerto Rico. (Bomberger Exh. 1; Bomberger, Tr. 208-09; 211-12.) Bomberger claims credit for a preference as an Hispanic-American. (Bomberger PFC at 5.)

13. Bomberger proposes to work fulltime (40 hours per week or more) as the station's general manager. In that capacity, he will be responsible for all the station's day-to-day operations. Those operations will include: programming, sales, business administration, and engineering. Bomberger also will be responsible for all ultimate decisions on hiring and firing of station personnel. Bomberger will implement and enforce the station's EEO policy and he will develop and maintain contacts with community leaders in furtherance of responding to the community's needs. (Bomberger Exh. 1.)

Broadcasting Experience

14. Bomberger has not produced any evidence on and makes no claim for any past broadcast experience.

Local Residence and Civic Activities

15. Bomberger has not produced any evidence on and makes no claim for local residence within his proposed service area or any related civic activity.

Auxiliary Power

16. Bomberger pledges to install auxiliary generators at both his studio and transmitter sites in order to assure uninterrupted broadcast service. (Bomberger Exh. 1.)

Basic Qualifying Issue

17. Bomberger was born in Washington, D.C. and spent his first fourteen years there. (Bomberger Exh. 1.) He was a boyhood friend of his communications counsel, George R. Borsari, Jr. ("Borsari"). In 1989, Bomberger was considering retirement plans and he spoke with Borsari about broadcast properties. Bomberger was initially interested in television broadcasting in Logan, West Virginia. It was while exploring that opportunity that Borsari advised him about the FM allocation in New Market. (Bomberger Exh. 1 at 1.)

18. Bomberger had visited the Logan area in his initial exploration efforts. He later returned to New Market with his wife. He met with professional consultants who were recommended by Borsari: a consulting engineer and a general partner of a licensee in Woodstock, Virginia.[7] (Bomberger Exh. 1 at 2.) Bomberger testified that he discussed the "economics of the area," the area's "potential growth," and "specific costs associated with the construction and operation of a radio station." (Bomberger Exh. 1 at 2.)

19. Bomberger decided to apply for New Market and with Borsari's assistance and counseling[8] he prepared and filed an application on October 26, 1989. But one of the "major concerns" remaining was "financing." (Bomberger Exh. 1 at 2.) Bomberger worked with Borsari on cost estimates and Bomberger became aware that "financing needed to be in place" and that he "had to have written evidence" of financing "prior to the filing of the application." (Bomberger Exh. 1 at 2.)

20. Borsari told Bomberger that he had "excellent contacts in the broadcast financial community." (Bomberger Exh. 1 at 3.) But Borsari felt that major banks would not be interested in making loans for such a small market and that therefore a financial institution would need to be found that was "interested in that region." (*Id.*) Borsari made inquiries and learned through an attorney acquaintance that the Mercantile-Safe Deposit & Trust Company of Baltimore ("Mercantile") "was interested in media proposals in the area." (Bomberger Exh. 1 at 4.) Borsari gave Bomberger the name of Jack E. Steil ("Steil") to contact at Mercantile and, according to Bomberger, Borsari was not acquainted with Steil. (*Id.*, Mr. Steil was a vice-president at Mercantile who was responsible for broadcast construction loans.

21. Bomberger testified that he prepared written cost estimates before contacting Mercantile. (Bomberger Exh. 2 at 8-10.) Bomberger further testified that he had received general information on "most of the relevant expense categories" when he had made his initial inquiries into a New Market opportunity. (*See* Para. 18, *supra*.) He admits that he knows little about the technical aspects of station operations. (Bomberger Exh. 2 at 3.) Bomberger explained his methodology for determining costs as follows:

> Mr. Borsari has told me that in connection with his representation of other clients he has been very involved in construction and acquisition financing, as well as in negotiations with suppliers of equipment packages and specific items of equipment for clients.

* * *

> He [Borsari] also advised me to prepare - - - the estimates of construction and operating costs.

(Bomberger Exh. 2 at 3-4.) (*See also* Bomberger's PFC at 9-10.) There was not any substantial evidence offered on the sources of the specific line-items that appear in Bomberger's written cost estimates.

22. On October 16, 1989, ten days before filing his application, Bomberger called Steil at Mercantile. Bomberger told Steil that he was interested in: "a bank letter of accommodation, or what's the term, a letter of credit for the construction of the radio station in New Market." (Bomberger, Tr. 205.)[9] Steil was noncommittal at that point and asked Bomberger to submit a "written proposal."[10] (Bomberger Exh. 1 at 4.) On that same day, October 16, 1989, Bomberger sent a letter to Steil requesting a "letter of commitment" in the amount of $225,000. Bomberger testified that he was asking for a "conditional commitment." (Bomberger Exh. 2 at 5.) Bomberger's letter also referred to an enclosed "draft letter." And Bomberger stated that also enclosed with the letter were his personal balance sheet, a summary of recent sales in the New Market area or similar areas, an estimate of construction costs, and an estimate of projected income from the station's operation. Bomberger stated in the letter that he would personally endorse the note and that he would pledge the station's assets as security. (Bomberger Exh. 1 at 7.) The letter was prepared by Bomberger with Borsari's assistance. (Bomberger, Tr. 151.)

23. The plain meaning of language utilized by Bomberger and Borsari indicates that Steil was furnished with a draft commitment letter that would meet Bomberger's need. Specifically, the October 16 letter stated in part:

> The attached draft letter details my request.

Bomberger denied that he had enclosed a draft. Yet Bomberger could not explain the meaning of that language which he had selected for use and which had been approved of by Borsari. For example, Bomberger's cross-examination reflects:

> Q. What did you mean when you wrote that sentence?
>
> A. As I said, I do not recall.
>
> Q. Did you ever provide Mr. Steil with a draft copy of a bank letter?
>
> A. No.
>
> Q. Do you know if anyone acting on your behalf provided Mr. Steil with a draft copy of a bank letter?
>
> A. I do not know.

(Bomberger, Tr. 152.) Borsari was not tendered as a witness to offer his account of the facts and Steil testified that he did not recall seeing a draft. (Bomberger Exh. 3 at 2.)

24. Mercantile provided Bomberger with a letter dated October 19, 1989, which stated in part:

> Dear Mr. Bomberger:
>
> We have reviewed your financial statement, your projection of costs and the summary of recent sales in the area.[11] This is to state our conditional commitment to loan up to $235,000.00 to finance construction and initial operation of a radio station licensed to New Market, Virginia. Our willingness to do so is subject to the following conditions:
>
> (1) You are successful in obtaining approval from the Federal Communications Commission to construct and operate the radio broadcast station; and,
>
> (2) All reasonable and ordinary credit criteria of the Mercantile-Safe Deposit and Trust Co. are met at such time as you (a) have received the permit to construct said station and (b) request from this Bank a formal and unconditional lending commitment.

The interest rate is contingent on the then prevailing rate and Mercantile contemplates charging "2% above the prime rate" at the time of loan disbursement. The remainder of the letter regarding security and an unqualified representation of knowledge by Mercantile of the borrower states as follows:

> The precise terms for security of the loan also will be determined at the time of the unconditional loan commitment. However, we contemplate requiring a pledge of the assets of the radio station subject to security liens held by vendors of equipment, if any, and we may also require your personal guarantees in a form satisfactory to the Bank. This Bank is personally and favorably acquainted with you and we would be relying on your commitment to continued participation in the venture and the management of the radio station as part of the loan application.

The letter is signed by Jack E. Steil. (Bomberger Exh. 1 at 17-18.)

25. Although the letter reflects that Mercantile was personally acquainted with Bomberger, Steil testified that Bomberger had no prior relationship with the bank. (Steil, Tr. 84, 104-05, 243.) Mercantile did not undertake a credit check on Bomberger or make a preliminary evaluation of his creditworthiness. (Steil, Tr. 81-83.) As Steil testified:

> As I think I stated before, we had a very general conversation, thought about the station, then issued the letter.

(Steil, Tr. 111.) It is found as a fact that Mercantile was not personally acquainted with Bomberger when Steil issued Mercantile's letter on October 16, 1989.

26. Steil was deposed on September 12, 1991, and at that time he testified that the October 16 letter was not a representation that Bomberger had a reasonable assurance of a Mercantile loan. (Steil, Tr. 80.)[12] Steil further testified that the letter did not reflect a determination on the part

of Mercantile about Bomberger's creditworthiness for a loan. (Steil, Tr. 82-83.) It is found that the letter issued by Steil on behalf of Mercantile on October 16, 1989, did not provide Bomberger a reasonable assurance that Mercantile would provide funds to construct and operate a station.

27. Bomberger testified without qualification that he had requested a "conditional commitment" from Mercantile. (Bomberger Exh. 2 at 5.) When Bomberger applied for the conditional commitment on October 16, 1989, he provided a personal balance sheet dated as of August 31, 1989, a statement of estimated costs and income, and a computer print-out reflecting sales of Virginia and West Virginia broadcast properties (collectively the "supporting documentation"). The balance sheet is not certified. Nor is it signed by Bomberger. It reflects liquid assets in the form of cash in the amount of $5,809 and money market funds in the amount of $84,562 for liquid assets totalling $90,371. Bomberger's automobiles, sailboat, jewelry and real estate are not liquid assets and values ascribed by Bomberger may be subject to question. However, the mortgage liabilities totalling $178,359 are not subject to question. Also, those mortgage liabilities detract further from the liquidity of the real estate values represented by Bomberger in his balance sheet.

28. Mercantile could not ascertain Bomberger's creditworthiness from his balance sheet. The evidence establishes that Bomberger sent his balance sheet and the other supporting documentation with his letter of October 16. Steil replied by letter dated October 19, allowing for only three days which are presumed to have been used for mail transmission. There is no evidence that hand-delivery was utilized. Therefore, there was not sufficient time for Steil to reasonably review the materials that Bomberger submitted. And Steil's testimony supports a finding that Mercantile did not rely on the balance sheet:

> Q. You haven't decided --- whether Mr. Bomberger would be the sort of individual whom you would be inclined to lend that money to based on a proposal made to you?
>
> Steil: It has not been decided, but there is a lot of due diligence that has to be done before we could go the other way. We still have an interest in looking at Mr. Bomberger and Mr. Bomberger's needs.

(Steil, Tr. 83-84.) There was no effort on the part of Mercantile to have Bomberger appear for a conference with Steil or others to review the balance sheet. Steil did not even telephone Bomberger to discuss his financial statement after it was received by Steil. Mercantile merely issued a letter in the form that it had used in the past[13] which may have been the forgotten "draft" enclosed in Bomberger's letter of October 16.

29. The values of the allegedly comparable broadcast properties are not described by coverage or by any estimate or history of advertising income. Nor is it clear that the sales prices were realized or that the transactions ever went to closing. Without further inquiry, this data would not inform Mercantile of the business merits of a loan to construct an FM station in New Market. Steil confirmed this conclusion when he testified:

> [K]nowledge varies in every distinct case because each borrower is different, is unique, I don't care if they're in the same industry. So, therefore, if you have the knowledge base you can respond.

(Steil, Tr. 90.) Thus, by Steil's own admission, Mercantile would require substantially more information about the economics of a broadcast station in New Market before it would commit to Bomberger's proposal. That would explain in part why the commitment letter was conditional. That also would explain why Steil would use either a draft that was furnished by Bomberger or a previously drafted form letter which Mercantile had used to accommodate other venture broadcasters.[14]

30. Bomberger asserts that at the time he filed his application he had cash and investments that were convertible to cash in excess of $90,000 and a net worth in excess of $178,000. (Bomberger's PFC at 13.) Bomberger asserts that it was based on that conclusion that he "planned to use his own money, if necessary, to build or operate the station." (*Id.*; Bomberger Exh. 2 at 5.) But in his Form 301 Application Bomberger cited only Mercantile as a funding source. There was no reference made to self-financing. (Commonwealth Exh. 4.) The first notice of an intent to self-finance was given in the testimony exchanged on September 23, 1991, a date after the "B" cut-off. Therefore, it is found as a fact that Bomberger did not timely disclose any intention to self-finance and that evidence is irrelevant.

31. There also is found to be a material variance between Bomberger's true costs of construction and his reliance on a net worth of $178,000 to construct and operate.[15] When Bomberger prepared his cost estimate in October 1989, he estimated the cost of side-mounting an antenna on an existing tower at $8,800. (Bomberger Exh. 2 at 10.) Bomberger later lost that site and under a new proposal the construction of a 169-foot tower would cost $25,000. Bomberger did not file a reporting amendment under §1.65 to disclose the increase in costs. Bomberger testified that he believed he still had adequate funding because he had initially over-estimated his costs by about $30,000. He further testified that with $90,000 in cash he contended that he still had sufficient personal funds available to construct and operate. (Bomberger Exh. 2 at 6.) He reasoned to that conclusion first by noting an error in the addition of his total costs: What was stated in his written cost estimate as totalling $95,000 (Bomberger Exh. 2 at 10) should be approximately $85,000 (Bomberger, Tr. 169-70).[16] Then he reasoned that Mercantile had granted him a conditional commitment of $235,000 instead of the requested $225,000 which would provide him an additional $10,000 windfall. Bomberger could not account for the additional monies in the Mercantile letter. (Bomberger, Tr. 170.) But he seeks credit for the $10,000 windfall in calculating his ability to finance. (Bomberger, Tr. 169-70.) This evidence establishes that Bomberger's budget was never carefully prepared or updated and was therefore an intrinsically unreliable source for Mercantile's consideration.

Steils Lack of Candor

Inconsistent Statements

32. The testimony at hearing established by a preponderance of the evidence that Bomberger had no previous relationship with Mercantile. (Steil, Tr. 84; 104-05;

Bomberger, Tr. 243.) (*See* Para. 25 *supra*.) Yet Steil had signed a Statement, that was prepared by Borsari, which was used to oppose adding the issue. (Steil, Tr. 72.) In his Statement Steil had stated that: "through a telephone conversation with [Bomberger] and through an outside reference, [I was] able to satisfy myself with the acquaintance issue." (Commonwealth Exh. 3.) Bomberger never produced the "outside reference" as a witness to corroborate Steil's conclusory testimony. The inconsistencies between Steil's hearing testimony and his earlier Statement reflect a predisposition on Steil's part to be less than candid in giving testimony in this case.

Subpoena Noncompliance

33. Steil was subpoenaed to testify in this case. A subpoena *duces tecum*, that was issued by the Presiding Judge on October 3, 1991, required Mr. Steil to appear to testify on October 15, 1991. He was required to bring with him all documents that were provided to Mercantile "by any person" in connection with the issuance of Mercantile's letter dated October 19, 1989. The documents were defined in the attachment to the subpoena in five discrete categories, one of which (Section F) included:

> All memoranda, notes or other documents relating or pertaining to conversations between yourself and George R. Borsari - - - regarding John D. Bomberger or your testimony in this case. (Commonwealth Exh. 16.)

And Borsari represented to the Presiding Judge that Steil was appearing to testify as an "independent witness" which meant to the Judge that his testimony had not been prepared with assistance on substance from Bomberger or Borsari. (Steil, Tr. 29.) He stated categorically at the outset of his testimony that he had no documents to produce and, after *voir dire* by counsel, his representation was accepted. (Steil, Tr. 38, 45.)

34. At the close of Steil's testimony, the Presiding Judge conducted his own *voir dire* on the completeness of the document production. (*See* Tr. 118-125.) Steil testified that he had instructed his subordinates at Mercantile to "go through Bomberger [and] through anything relating to Borsari." (Steil, Tr. 118.) Steil further testified that he personally searched his desk and gave similar instruction to his personal secretary. (Steil, Tr. 119.) Mr. Steil also consulted with Mercantile's in-house counsel on compliance with the subpoena and in-house counsel advised Steil to try and find the documents. (Tr. 120.) Personnel from Steil's office, from Mercantile's credit services and from a personal loan department were involved in the search. (Steil, Tr. 120.) Steil also noted that these same classifications of documents had been sought when he was subpoenaed for his deposition of September 12, 1989. (*Id.*) Steil did not know the period of time that such documents are retained by Mercantile, but he suggested that responsive documents may have been discarded during a periodic house-cleaning in the Summer of 1991. (Steil, Tr. 121.)

35. On October 15, 1991, Steil answered affirmatively in open court and under oath to the direct question:

> Judge Sippel: And you're confident that there has been due diligence exercised with respect to trying to locate these files?
>
> A. Yes, Your Honor, I can tell you that.

(Steil, Tr. 123.) Yet on the very next day, October 16, 1991, and without any advance notice, Steil delivered to the Presiding Judge *via* Federal Express, a number of responsive documents which were later introduced and received in evidence as Commonwealth exhibits. (Tr. 332.) A letter from Steil to the Judge that accompanied the documents, and that was dated October 15, 1991, stated:

> Enclosed are various letters and related information which seemed to adhere to Section F of the documents needed under the subpoena in the above case.[17] Any financial information for Bomberger was recently received and was not the result of finding the missing credit file.

(Commonwealth Exh. 9.)[18] The documents included a copy of the subpoena *duces tecum*. In addition, there was a letter from Borsari to Steil dated July 8, 1991. (Commonwealth Exh. 10.) That letter suggests to Steil that he had made a "review" of financial documents and that Steil had issued a letter of "reasonable assurance." (*Id.*) Borsari also furnished to Steil Bomberger's deposition and the Opposition of Bomberger to the motion to add issues that also contained Bomberger's factual Declaration. Borsari then stated in the penultimate paragraph:

> I believe that we can put the entire matter to rest very quickly by the submission of the enclosed statement. I have prepared the enclosed statement based on our best recollection of the events and circumstances. Please, read the statement carefully, and if it is accurate, and only if it is accurate, please sign the statement where indicated and return it to me. If you have any difficulty with any of the statements in the letter, or anything does not agree with your recollection, please call me.

(Commonwealth Exh. 10 at 2.)

36. This evidence eliminates Steil as an "independent" witnesses. There is no evidence and no indication in Borsari's letter that he had spoken with Steil about Steil's recollection of the facts before sending Steil the letter. As far as the evidence discloses, Steil's testimony was solicited cold by Bomberger and Borsari. He was specifically solicited in the letter to testify that he had "reviewed" Bomberger's financials and that Mercantile had issued a letter of "reasonable assurance."

37. Borsari also anticipated questions about the missing "draft" letter referred to in Bomberger's letter to Steil. (Bomberger Exh. 2.) Borsari stated in his letter to Steil of July 8, 1991:

> At the time, Mr. Bomberger and I discussed the possibility of submitting for your consideration a draft bank letter that set forth the terms that we were requesting and the terms required by the FCC. However, to the best of my recollection, Mr. Bomberger, after the discussion with you, felt that your were so knowledgeable concerning broadcast loans that a draft letter would be unnecessary. Con-

> sequently, while the letter to you refers to a bank letter, it is Mr. Bomberger's best recollection that no bank letter was submitted by him to you.

(Commonwealth Exh. 10 at 1.) Steil also covered that factual point favorably to Bomberger in his sworn written testimony of September 23, 1991: "To the best of my recollection, Mr. Bomberger's letter did not include a draft bank letter." (Bomberger Exh. 3 at 2.) It is noted that neither Bomberger nor Steil could testify categorically that Bomberger had not included a draft bank letter when he contacted Steil in October 1989. But the conclusion to be drawn from Borsari's letter is that if Bomberger omitted the draft its omission was deliberate after talking to Steil and becoming satisfied that Steil/Mercantile would issue a letter in a form that was satisfactory to Borsari and Bomberger.

38. In addition to Borsari's letter, in advance of his testimony, Mr. Steil was furnished with the following additional documents:

> (a) Answers of Bomberger to Requests for Admission dated September 4, 1991. (Commonwealth Exh. 11.)
>
> (b) Direct case testimony of Bomberger hi-lighted by Borsari with cross-references to deposition testimony and sources of information (i.e Borsari/Bomberger). (Commonwealth Exhs. 12, 13.)
>
> (c) Editorial comments to Steil's proposed sworn written testimony. (Commonwealth Exh. 14.)

These documents further establish that Steil was not an independent witness. Rather, he was substantially under the influences, if not under the control, of Bomberger and Borsari with respect to his testimony. The evidence also supports a finding that Steil had initiated a thorough search for documents that related to Sections A through E of the subpoena, *i.e.*, those that were proximate in time to this October 19 letter. But those documents do not include Section F documents which apparently were readily available. By concealing those documents that were called for in Section F of the subpoena, by responding that such documents did not exist, and by waiting until leaving the witness stand to produce them, Steil was less than candid in his testimony and he has thereby substantially tainted his credibility which is the testimony of a material witness.

Commonwealth Audio Visual Enterprises, Inc.

Proposed Integration

39. Commonwealth is a closely held (non-public) Virginia corporation with a single class of voting stock. J.D. Cave ("Cave") owns 100% of the stock and therefore he alone controls 100% of the company's votes. Cave also serves as the company's president and he holds one of its two directorships. His wife, Ms. Jeanne Cave, is corporate secretary and she is the second director. (Commonwealth Exh. 1.)

40. Commonwealth asserts no claim for a minority or a gender preference. (Commonwealth Exh. 1 at 2.)

41. Commonwealth proposes to fully integrate Cave into its management as the station's general manager. (Commonwealth Exh. 1.) Cave has timely committed to resign from his current position as general manager of Stations WRAA(AM) and WLCC(FM) at Luray, Virginia. He is also committed to abandon any other activity that might interfere with his position as general manager, such as his occasional lawn maintenance that he performs at a family-owned tree farm from time to time about 3 hours each month. (*Id.*)

42. As the station's general manager, Cave will establish and carry out all management policies and procedures. He will establish all programming and he alone will make all managerial decisions. In these capacities he will have over-all supervisory responsibility for all aspects of day-to-day operations. He will hire and fire employees and all employees will report to him. (Commonwealth Exh. 1 at 2.)

Broadcasting Experience

43. From 1968 to 1970, Cave served in the United States Navy where he operated radio communications equipment as a "Radioman." (Commonwealth Exh. 1 at 6.) After his discharge from the military in 1970, Cave gained employment with Station WKIK(AM) in Leonardtown, Maryland as announcer and salesperson. (*Id.*) He also received a third class radio operator's license that year which he continues to hold. (Commonwealth Exh. 1 at 7.) Cave's duties included on- air announcing, production and sales. In 1973, he was promoted to sales manager which involved his supervising a three person sales staff. (Commonwealth Exh. 1 at 6.)

44. In 1975, Cave left Station WKIK(AM) and he became employed with Stations WCHV(AM) and WWWW(FM) in Charlottesville, Virginia. His duties included on-air announcing and production sales. He left that position in 1976 to take a position in Harrisonburg, Virginia at Station WQPO(FM). There he was responsible for overseeing and directing the station's overall operations, including programming and sales. (Commonwealth Exh. 1 at 6.)

45. In 1981, Cave left Station WQPO(FM) for his present position as general manager of Stations WRAA(AM) and WLCC(FM) at Luray, Virginia. He has overall responsibility for both stations. In 1988, Cave formed Commonwealth as a corporate entity and he purchased the two stations through the corporation.

Local Residence

46. From 1976 to 1981, Cave resided in the local community (i.e., within the 1 mV/m contour) and from 1981 to the present he has worked in a part of Luray that is within the 1 mV/m contour. (Commonwealth Exh. 1 at 2.) From 1981 to the present, he has resided in Stanley, Virginia on a farm that is located 1.3 miles outside the 1 mV/m contour. (*Id.*) But, as indicated above, he has worked in Luray at a location that is within the city of license for New Market.

47. Commonwealth had erroneously represented in its Form 301 application of October 26, 1989, that Cave's present residence in Stanley was within the 1 mV/m contour. (Commonwealth Exh. 1 at 3; PFC at 38.) The same error was made in Commonwealth's Integration and Diversification Statement that was filed and exchanged on March 8, 1991. Cave was not aware of the error until

after his deposition was taken on April 30, 1991. (Commonwealth Exh. 1 at 5.) The error was corrected in Commonwealth's hearing (exhibits which were exchanged on September 23, 1991. (*See* Commonwealth Exh. 1A.)

48. Due to an unrelated event, Commonwealth was required to amend its engineering and relocate its antenna site in order to avoid an unforeseen short-spacing that was caused by a Commission frequency allotment. *See Memorandum Opinion and Order*, FCC 91M-3109, released October 25, 1991.[19] Commonwealth chose the same site as Bomberger and the amendment has been accepted. *Id.* As of October 25, 1991, the engineering amendment has brought Cave's residence within Commonwealth's 1 mV/m contour.

Civic Activities

49. Cave has introduced considerable evidence relating to his civic involvement in the service area and the local community. He was a representative of the Shenandoah Valley Travel Association in New Market from 1982 to 1984. Cave spent several hours each year promoting local travel and tourism. (Commonwealth Exh. 1 at 7.) In 1979, Cave spent several hours on an Advisory Committee at meetings at Keezletown Elementary School where he provided input on projects for gifted children. (*Id.*) From 1978 to 1980, Cave served on the board of directors of the Rockingham County Heart Association. For those years, Cave also participated as a member of the publicity committee of the Downtown Harrisonburg Merchants Association. (*Id.* at 8.)

50. From 1982 to the present, Cave participated in activities with the Stanley Lions Club (hearing, sight, drug abuse, diabetes) and in 1984 he held the office of president. (*Id.* at 8.) Also, from 1982 to the present he participated in community activities on the Page County Virginia Chamber of Commerce where he primarily attended meetings designed to foster local county business, economic and industrial growth. (*Id.*) In 1985 and in 1991 he served as the Chamber's vice-president. In 1991 he was a member of the Chamber's executive board where he arranged for guest speakers and organized seminars on topics of interest. He was elected president of the Chamber for 1982. (*Id.* at 8-9.)

51. From 1988 to the present, Cave was a member of the board of directors of the American Lung Association of Virginia raising money for lung disease research. Also, since 1988, Cave was involved with the organization and activities of a local drug education and rehabilitation project called CADRE (Commonwealth Alliance for Drug Rehabilitation).

52. And from 1982 to the present, Cave was a member of the Stanley Elementary Parents-Teachers Association. He served as PTA president in 1984. He also was a member of the Page County High School PTA since 1988 where he also served as vice-president in 1988. Cave's PTA involvements included attending meetings and contacting parents for input on best use of school resources. (*Id.* at 10.)

53. There are three instances of claimed civic involvement that are not credited. In 1985 through 1989, Cave served as a director of the Virginia Association of Broadcasters, a statewide trade association of the broadcast industry. In 1989, the year in which he filed his application, Cave became a charter member and the first president of the Page County Crime Solvers, described as a telephone "hotline" for use in identifying crime perpetrators. And since 1985, Cave has been a member of Christ Episcopal Church where he now serves as Senior Warden. But there is no evidence of Church-related civic activities in which cave was engaged. Nor is there any evidence of the Church's geographic location.

Auxiliary Power

54. Commonwealth will construct auxiliary power generation facilities at the station's studio and transmitter site. (Commonwealth Exh. 1 at 11.)

CONCLUSIONS OF LAW

55. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service and an assessment of the evidence must be made under the applicable Commission standards in determining which applicant meets the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

56. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification; and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F.C.C.*, 735 F.2d 601, 603-07 (D.C. Cir. 1984). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and management and the enhancement of such integration by local residence, civic activities, broadcast experience and racial minority preference.

57. But before conducting the comparative analysis, a determination of the basic qualifications of Bomberger must be made. *Louis Adelman*, 28 F.C.C. 432 (Comm'n (1960), *recon. denied* 29 F.C.C. 1223 (Comm'n 1960), *aff'd sub nom. Guinan, et al.* v. *F.C.C.*, 297 F.2d 782 (D.C. Cir. 1961).

Bomberger's Financial Qualifications

58. The Commission's application form, FCC Form 301, requires certification by an applicant of the fact that "sufficient net liquid asserts are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." *See* Form 301, Section III (1989). The standard for evaluating the availability of funds continues to be the "reasonable assurance" standard. *See In re Revision of Application, Report And Order*, 4 F.C.C. Rcd 3853, 3859 (Comm'n 1989). *See also Scioto Broadcasters Limited Partnership*, 5 F.C.C. Rcd 5158 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 4626 (Comm'n 1991). And where financing is to be provided by others, "the applicant must have a reasonable assurance of a *present firm intention* for each agreement to furnish financing." *Dutchess Communications Corp.*, 101 F.C.C. 2d 243, 246 (Review Bd 1985). (Emphasis added.)

59. The burden of proof and the burden of proceeding on the added issues were assigned by the Presiding Judge to the applicant Bomberger. *Memorandum Opinion and Order*, FCC 91M-2503, *supra*. Therefore, Bomberger must show by a preponderance of the evidence that under the added issues he is basically qualified to be a Commission licensee. *TeleStar, Inc.*, 2 F.C.C. Rcd 7352-53 (Comm'n 1987). *See also Steadman* v. *S.E.C.*, *supra* at 100-102.

60. Bomberger admits that he had no prior dealings or relationship with Mercantile. He asserts that he chose Mercantile because Mercantile "*solicited* communications loans." (Bomberger's RPFC at 3-4.) (Emphasis in original.) Steil had a contact who referred communications lending situations to the bank. (*Id.*) Bomberger was just one of several or many such situations which came to Steil. Bomberger made his request just ten days before Bomberger's filing deadline and without sufficient time for Mercantile and Steil to gain adequate knowledge of Bomberger, his assets and financial wherewithal, and the project's viability. According to his own written testimony, Bomberger requested only a "conditional commitment" which is not the "present firm intention" that the law requires. *Multi-State Communications, Inc.* v. *F.C.C.*, 590 F.2d 1117, 1120 (D.C. Cir. 1979). Bomberger clearly wanted a letter of accommodation to qualify and Mercantile provided him with one in just three days. Steil had not decided whether the bank would ever make the loan and he had no more than an interest in later looking at Bomberger's needs. (*See* Para. 28, *supra.*) Thus, Steil's letter was no more than an accommodation. *See Christina Communications, et al.*, 2 F.C.C. Rcd 1971, 1974 (1987) (bank letters must be more than accommodations).

61. Bomberger had testified that financing was a "major concern." (*See* Para 19, *supra.*) When that was pointed out in Commonwealth's PFC, Bomberger countered with the following post-hearing argument: The reason or motive for Bomberger's major concern was "because the small size of the loan [$225.000][20] precluded the involvement of major banks." (Bomberger's RPFC at 5.) And since Bomberger had no established relationship with a regional bank, he was concerned. (*Id.*) Actually, it is concluded from the evidence that Bomberger's liquid assets were substantially below the amount of the desired loan which is a more probative reason for Bomberger having a major concern over financing. (*See* Para. 27 above.) For there was no evidence offered by Bomberger that he had been turned down by a "major bank" or by any banking institution in the Denver area where he resided for many years and presumably had one or more banking relationships that could accommodate a present firm intention to make a $225,000 commitment.

62. The conclusion reached here is that Bomberger was steered to Mercantile by Borsari because Mercantile, in 1989, was engaging in the business of soliciting communications loans. Mercantile allowed itself perhaps only hours to consider Bomberger's proposal. Bomberger sent his request with documentation on October 16 and Steil sent Mercantile's response on October 19. Without even a telephone call to discuss costs, finances, or comparable sales, Mercantile provided Bomberger with only a "conditional commitment." (*See* Paras. 26-28, *supra.*) In a prehearing deposition, Steil denied that Mercantile's letter was a reasonable assurance. According to Steil, his letter was only a statement of intent to look at a later loan application. (Steil, Tr. 80-82.) The letter specifically omits "pricing and terms of amortization" and merely "contemplates" extending a loan at 2% over prime that would be payable in eight years. And no collateral was specified. Rather, precise terms of security would be determined by Mercantile only when an "unconditional loan commitment" was made. A future pledge of non-specified station assets and a personal guarantee from Bomberger were merely contemplated. (Bomberger Exh. 2 at 17-18.) (*See* Para. 24, *supra.*) The reference in the letter to being "personally acquainted" with Bomberger has been rejected and since it is a contrived sentence intended to convince the Commission of a "reasonable assurance," such a volunteered fabrication is further evidence that Mercantile's letter was a misleading accommodation. (*Id.*)

63. Commission case law requires that applicants be able to demonstrate substantial compliance with the underlying "fundamental obligation to obtain reasonable assurance of funding" before financial certification. *Marlin Broadcasting of Central Florida, Inc.*, 5 F.C.C. Rcd 5751 (Comm'n 1990). *See also Scioto Broadcasters, supra* and *Northampton Media Associations*, 4 F.C.C. Rcd 5517, 5518-19 (Comm'n 1989) (reasonable assurance means net liquid assets on hand or committed sources of funds to construct and operate for three months). There is no allowance made by the Commission for a "conditional" commitment.

64. The Review Board has construed the standards for reasonable assurance of a bank letter in the case of *Albert E. Gary, et al.*, 5 F.C.C. Rcd 6235 (Review Bd 1990). There the Review Board held:

> [A]n inquiry about the terms and conditions of a bank letter is not a mere formal exercise, but rather is designed to establish, *at a bare minimum*, that the lending institution *has reviewed* a broadcast applicant's financial needs and qualifications; that *adequate collateral* has been demonstrated; that the tentative terms of the loan have been specified; and *that the institution has a present firm intent to make a loan, subject to future review.*

5 F.C.C. Rcd at 6237 (emphasis added). Mercantile had not had time to review Bomberger's needs, it was shown a flawed list of costs, it was only asked for a conditional commitment, and Steil was not prepared to give a reasonable assurance. Thus, it is found that Mercantile's "conditional commitment" fails the present firm intention test for reasonable assurance of financing. *Id.* In addition, since the letter was granted by Mercantile to a stranger to the bank on the probable date of receipt of the request, and since there was no personal meeting, or even a telephone conversation, between Bomberger and Steil to discuss the financial statement, cost estimates, income estimates, or sales of comparable properties, there was no "*bona fide*" review made by Steil. In this regard it is again noted that Bomberger's balance sheet showed liquid assets of only $90,371 while costs were represented to total $225,271. Further, there is no evidence that the comparable "sales" went to closing at the prices disclosed, or that they ever went to closing. But those infirmities apparently were of no concern to Steil who recognized that he was merely making a "conditional commitment" and thus the letter would be a mere accommodation.

65. There was no basis to arrive at a reasonable assurance based upon Bomberger's costs and income estimates. Bomberger produced no evidence of the specific line-item sources that were used to determine his costs or his estimated monthly income. Bomberger may have relied on Borsari. But there was no evidence introduced on Borsari's sources or methodology. Bomberger relied on only second hand conclusory sources furnished by Borsari, perhaps no more than recycled data from other unrelated applicants. The Commission has held that when a financial qualification issue is added the applicant must at least:

> [a]dduce probative evidence that it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs.

Northampton Media Associates, 4 F.C.C. Rcd 5517, 5519 (Comm'n 1989). The same principle should hold true for estimated income which a bank is asked to rely upon. And probative evidence necessarily includes something more than a self- serving, uncorroborated statement of the individual who is responsible for the certification, i.e., Bomberger. *Id.* Here, Bomberger has failed to meet his burden of proof by the absence of probative, reliable evidence on estimated income and sources for cost estimates.

66. Nor has there been any satisfactory evidentiary resolution of the question concerning the draft letter that is referred to in Bomberger's letter of October 16, 1989: "The attached draft letter details my request." (*See* Para. 23, *supra*.) Bomberger testified categorically that "no" he did not include a draft with his October 16 letter. (Bomberger, Tr. 152.) But he did not know whether or not anyone acting on his behalf had provided Steil with a draft bank letter. (*Id.*) Although Bomberger prepared his October 16 letter with the assistance of counsel, Borsari does not understand how the reference to a draft was inserted in his letter. (*Id.*) Steil's testimony is more qualified in that he only could not recall ever seeing a draft bank letter. (Bomberger Exh. 3 at 2.) Such evidence is inconclusive. But inconclusive evidence alone will not be the basis for a conclusion that the witnesses were being less than candid about the draft. The effect of Steil's testimony is that he contends that he did not rely on a draft bank letter that may have been furnished by Bomberger in preparing Mercantile's "conditional commitment" letter of October 19, 1989. But Steil also admitted that he relied on a previous letter not related to Bomberger that was used by Mercantile. (*Id.*) That previous letter was not produced in discovery and was never offered in evidence. It will be presumed to be substantially the same letter as Steil's letter to Bomberger. Such similarity is found to be circumstantial evidence of reliance on a type of form bank letter which facilitated Steil to accommodate Bomberger with a "conditional commitment." Moreover, Bomberger's letter was mailed on October 16, 1989, and assuming three days for mailing from Aurora, Colorado to Baltimore, Maryland, Steil received the letter and supporting documents on October 19, 1989, the same date as Steil's letter to Bomberger. Thus, where a commitment is conditional, the transaction becomes totally riskless for the bank and there is no business or economic incentive to spend much time in investigation, analysis, or in the letter's preparation. The basic legal requirement is that the bank letter show "a present firm intention." *See Albert E. Gary, supra. See also Multi-State Communications, Inc.* v. *F. C. C., supra* at 1120. Where the bank uses a previous letter in offering a prospective lender a "conditional commitment" there would not be any "present firm intention." The evidence as presented by Bomberger, who has the burden of proof, only supports the conclusion that Mercantile's letter was a mere accommodation. Therefore, it is not necessary to further pursue the elusive draft of which Mr. Bomberger wrote but about which he claims to know nothing.

67. There is an additional evidentiary reason for presuming that the Mercantile letter was at best an accommodation letter that would, as a matter of law, not provide a reasonable assurance. Steil was the sponsor of Mercantile's letter. Yet Steil failed to comply with the conditions of the Commission's subpoena to bring relevant documents concerning his testimony that were in his possession or under his control. Steil made reasonable efforts to locate documents directly connected with issuing his October 19 letter. But the subpoena also called for documents from Borsari relating to his testimony. His non-compliance is found to have been intentional given the fact that he produced the responsive documents "over the transom" within 24 hours of having testified that he could find no responsive documents. (*See* Paras. 33-35, *supra*.) That intentional act of non-compliance with a Commission subpoena is compounded by the following factors: First, Bomberger, through his counsel Borsari, represented in open court that Steil was appearing as an "independent witness." It was based in part on representations by Borsari that Bomberger had no control over Steil's appearance as a witness that a subpoena was found to have been required to obtain his appearance. Yet we learned after Steil left the witness stand that Borsari had sent pre-hearing documents to Steil regarding his testimony, including a two page narrative that used suggested conclusory language such as a "review" of Bomberger's supporting documents and an intended "reasonable assurance." (Commonwealth Exh. 10.) Those documents could have been used in cross-examination to test Steil's independence as a testimonial witness.[21] Second, after he left the stand and produced the responsive documents, the record was left open to permit an explanation. *See Order* 91M-3108, released October 21, 1991. Bomberger did not recall Steil to clarify the situation and Steil did not request to reappear to offer an explanation. Therefore, Steil's representations in open court that he had complied with the subpoena are found to have been less than candid.[22] Third, in view of the added circumstance that Borsari drafted Steil's testimony which is substantially the same testimony that was attested to by Steil as true and accurate, it is concluded that Steil was not an independent witness. Rather, his testimony was structured by Borsari. Then Steil withheld material evidence that would have disclosed to opposing counsel the scope of Borsari's involvement in preparing Steil to testify "independently", and Commonwealth was thereby denied its right to conduct a full and complete cross-examination of Mr. Steil, a material witness.

68. For the reasons stated in the preceeding paragraph, the testimony of Mr. Steil is rejected as lacking the opportunity to be tested by cross-examination. Therefore, his testimony on reasonable assurance has no relevance and it will be afforded no weight.[23] And without Steil's testimony which would be essential to meeting Bomberger's burden of proof of a Mercantile present firm intention, Bomberger has failed to sustain his burden of proving by a preponderance of the evidence that when he signed his application he had a reasonable assurance of his financial ability to construct and operate.

69. Mercantile's letter is found to be a mere accommodation and for that reason alone Bomberger is not basically qualified for a grant. *Mableton Broadcasting Company, Inc.*, 5 F.C.C. Rcd 6314, 6326 (Review Bd 1990); *Opal Chadwell*, 4 F.C.C. Rcd 1215, 1217 (Comm'n 1989) (validity of applicant's proposal must be established in order to qualify for a grant). But there is still a second prong to the inquiry: whether Bomberger misled the Commission when he certified to his financial ability in

his Form 301. *See Albert E. Gary, supra* at 6234 (before shifting to proof on misrepresentation or demeanor applicants are required to first establish that they were financially qualified at certification).

70. An applicant will not be found to have misrepresented if the misrepresentation is merely erroneous and there is no evidence of an intention to deceive. *Fox River Broadcasting Co.*, 93 F.C.C. 2d 127, 129 (Comm'n 1983). But there is substantial evidence here of an intent to deceive. Bomberger is an experienced business person who was relying on legal counsel who is an experienced communications counsel. Bomberger was admittedly concerned about financing and he had only a few days within which to justify a financial certification. He knew that liquid personal assets of $90,000 would be insufficient. Borsari steered him at the last minute to Mercantile which was at that time engaged in the business of considering loans for broadcast applications. Steil had previously issued Mercantile bank letters for applicants. But Bomberger knew that Steil had no time to meaningfully consider his financial statement and supporting documentation in such a short period of time. Bomberger also knew that the statement in Mercantile's letter affirming that the bank was personally acquainted with him was false in the extreme. Bomberger admitted that he was only seeking a conditional commitment. And Steil admitted in a deposition that the letter was not a reasonable assurance. Afterwards, Borsari attempted through his letter of July 8, 1991 (Commonwealth Exh. 10) to focus Steil on the legal conclusion of a reasonable assurance which indicates a knowing attempt to mislead the Commission through a positive financial certification based on a "conditional commitment" that was an accommodation.

71. Thus, there is sufficient evidence to conclude that Bomberger intended to mislead the Commission with Mercantile's accommodation letter. And the Review Board has held that similar circumstances are evidence of financial misrepresentation appropriate for litigation and adverse conclusions if supported by the evidence. *See Shawn Phalen, Slip Op.* FCC 92R-1, released January 23, 1992 (Review Board required inquiry into whether applicant had falsely certified when it was not clear whether Spirit had prepared a serious budget). Here there is substantial evidence to support the conclusion that Bomberger intended to misrepresent to the Commission that he was financially qualified to construct and operate an FM broadcast station at New Market.

Contingent Comparison Conclusions

72. Bomberger is found to be basically unqualified to receive the grant and for that reason the construction permit will be granted to Commonwealth. Both the parties' evidence will be contingently considered in the event that the adverse findings and conclusions as to Bomberger should be reversed on appeal.

Diversification

73. Commonwealth has timely committed to divest ownership of Stations WRAA(AM) and WLCC(FM) and Cave is committed to resign as general manager of those stations. Bomberger owns no attributable interest in any medium of mass communications. Therefore, no party receives a diversification credit or demerit. *Policy Statement On Comparative Broadcast Hearings, supra* at 394-95.

Comparative Coverage

74. The parties have entered into a Stipulation that has been accepted by the Presiding Judge and it is concluded that there are no substantial differences in the parties' proposed coverages. Therefore, neither party receives a credit for superior coverage.

Best Practicable Service

75. Cave, on behalf of Commonwealth, and Bomberger individually are each committed to 100% integration and each applicant is accorded full integration credit. Each applicant also receives equal credit for proposed auxiliary power.

76. Cave will receive credit for his residence within the local community for five years from 1976 to 1981. He also will be credited with having acquired substantial knowledge of the community's needs by virtue of his long-term employment in the community of license and his residence in the service area since 1976.[24] (*See* Paras. 46-47, *supra.*) Bomberger has no claim to prior local residence. Bomberger has committed to move to the community of license. But he has no history of local civic activity.

77. Commonwealth is awarded a substantial comparative credit over Bomberger because of Cave's local residence and time spent working in the community, coupled with his demonstrated civic activities. (*See* Paras. 46-52, *supra.*) *Ronald Sorenson*, 6 F.C.C. Rcd 1952-53 (Comm'n 1991) (local residence and civic activities are considered together to determine which applicant would better serve the community).

78. Bomberger's minority status would receive equal enhancement credit with Commonwealth's local residence/civic activities. *Radio Jonesboro, Inc.*, 100 F.C.C. 2d 941, 945 (Comm'n 1985); *Metro Broadcasting* v. *F.C.C.*, 110 S. Ct. 2997 (1990). But Commonwealth would receive a very slight advantage for his broadcast experience of 23 years. *Ronald Sorenson, supra* at 1954. Therefore, under a contingent comparative analysis Commonwealth also would be the winner.

Summary Conclusions

79. Commonwealth is awarded the construction permit because it is basically qualified while Bomberger is disqualified for his failure to have a reasonable assurance of his financing at certification and for falsely certifying to the Commission that he was financially qualified. Alternatively, under a contingent comparative analysis, both applicants receive 100% integration credit and equal comparative credit for Commonwealth's local residence/civic activities and Bomberger's minority preference. But Commonwealth would be the comparative winner because of Cave's superior broadcast experience.

ORDER

Based on the foregoing, IT IS ORDERED that unless an appeal from this *Decision* is taken by a party, or unless the Commission reviews this *Decision* on its own motion,[25] the application of John D. Bomberger (File No. BPH-891026MC) IS DENIED.

IT IS FURTHER ORDERED that the application of Commonwealth Audio Visual Enterprises, Inc. (File No. BPH-891026MT) for authority to construct a new FM Station on Channel 277A in New Market, Virginia IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] This proceeding initially was a six party case. Leo M. Bernstein withdrew voluntarily (*Order* FCC 91M-860, released March 6, 1991); Jeffrey D. Southmayd withdrew voluntarily (*Order* FCC 91M-923, released March 12, 1991); and Skyline Radio, Inc. was dismissed for failure to pay a hearing fee (*Order* FCC 91M-1445, released April 25, 1991). A fourth party, Oscar Haynes, was dismissed pursuant to a money settlement. *See Memorandum Opinion and Order*, FCC 91M-2518, released August 14, 1991.

[2] On September 23, 1991, Commonwealth filed a motion for summary decision on the added issues. A Prehearing Conference was held on September 26, 1991, and after hearing argument the Judge rejected an eve-of-trial summary decision as appropriate for those issues. Therefore, the parties were required to proceed to trial on the assigned date, October 15, 1991. *See Order* FCC 91M- 2961, released September 30, 1991.

[3] On October 2, 1991, a telephone conference was held by the Presiding Judge and all counsel regarding a subpoena duces tecum requested by Commonwealth to require Mr. Stiel's attendance as a witness.

[4] It was found that Commonwealth's site change was unanticipated due to a Commission allocation made after Commonwealth had selected its first site, the move was unforeseen and involuntary, no new issue needed to be added, no party was prejudiced by the move, Commonwealth gained no comparative advantage, and the Bureau's Comment of October 9, 1991, supported the amendment. *Id.* at Para. 4.

[5] The first issue was an air hazard issue set against a former applicant, Leo M. Bernstein. Since Bernstein's application was dismissed the air hazard issue became moot.

[6] Commonwealth's divestiture commitments are contained in its Form 301 application filed on October 26, 1989, and in its Integration and Diversification Statement that was exchanged and filed on March 8, 1991.

[7] New Market and Woodstock are in the same grid of a recent AAA map and are calculated by the map's scale to be about 15-20 miles apart. (*AAA Eastern States South*, 1984 Ed. at grid G-18.)

[8] There was no written fee arrangement. Bomberger testified that if Bomberger received a grant or a settlement for cash, he would pay Borsari for services based on Borsari's hourly rate. If Bomberger lost, he and Borsari "would work out some kind of payment schedule." (Bomberger, Tr. 203.) A similar informal fee arrangement was apparently agreed to between Bomberger and the engineer. (*Id.*)

[9] The quoted language represents counsel's question as it was posed to Bomberger at the hearing. But Bomberger was being confronted with the precise words he admitted using at his deposition. (Bomberger, Tr. 205-06; Commonwealth Exh. 5.)

[10] There is no affirmative testimony of Bomberger as to whether Stiel asked for more specific information beyond a "written proposal."

[11] Note: There is no reference by Steil to any estimate of operating income although Bomberger's letter of October 16 had stated that his proposal included "my estimate of income." (Bomberger Exh. 2 at 7, 17-18.) *See also* Bomberger's conclusory estimate of operating income at $25,000 per month. (Bomberger Exh. 2 at 10.) It appears from Steil's letter that Steil was not relying on Bomberger's conclusory estimate of expected income.

[12] The deposition testimony flatly contradicts Steil's written testimony introduced at trial wherein he testified that Mercantile intended to make a loan to Bomberger when Steil issued the letter. Steil's testimony is disingenuous by representing that it was Steil's intention to indicate to Bomberger that he had a reasonable assurance of a loan. (*Cf.* Bomberger Exh. 3 at 2.)

[13] Steil testified that his letter to Bomberger was modeled on a former Mercantile letter that was used to provide "reasonable assurance" to another unrelated applicant in a different broadcast venture. (Commonwealth, Exh. 2.)

[14] Steil was represented as being Mercantile's communications loan officer and he was at one time personally responsible for Mercantile's communications loan portfolio which included loans to 15 ventures. (Steil, Tr. 36-37.)

[15] As previously indicated, Bomberger did not produce any back-up documents to his written but factually unsupported cost estimates or his income estimates. (*See* Para. 21, *supra.*)

[16] The true calculation based on Bomberger's numbers is $85,550 which would net Bomberger an additional $9,650 which is $350 less than his calculated $10,000.

[17] Section F of the subpoena called for production of communications (memoranda, notes or other documents) between Steil and Borsari regarding Steil's testimony. (*See* Para. 33, *supra.*)

[18] Commonwealth's counsel was not sponsoring the documents. He was merely facilitating the incorporation of the documents into the record. (Tr. 456.)

[19] *See also Amendment of FM Allotments for Crozet and Dillwyn Virginia*, 6 F.C.C. RCD 5159 (MM Bur. 1991).

[20] Bomberger asked for $225,000 in his letter of October 16, 1989. Steil responded on October 19, 1989, that Mercantile would conditionally commit for $235,000. (Bomberger Exh. 2 at 7, 17.) There is no explanation offered for the $10,000 variance. (*See* Bomberger, Tr. 170.) That discrepancy of $10,000 is an indication of the frivolous manner in which the proposal was handled and is considered to be further evidence of an accommodation frame of mind. (*See* Para. 31, *supra.*)

[21] A portion of Mr. Borsari's letter of July 8, 1991 (Commonwealth Exh. 10) is set forth below. It illustrates how meaningful this evidence becomes when it is compared with Steil's written testimony (Bomberger Exh. 3) after Steil was represented by Borsari in open court to be an "independent witness" (Tr. 29). The letter states in pertinent part:

> Dear Mr. Steil,
>
> In September, 1989, Mr. John Bomberger contacted you concerning the possibility of Mercantile Safe Deposit & Trust Co. financing the construction and operation of a new FM radio station in New Market, Virginia. In that

> connection, he discussed the matter with you on the telephone, and subsequently sent to you a packet of information containing his personal finances, his financial plans for the construction and operation of the station, and information concerning the general value of stations in the New Market area. After a review by you of the financial documents, you issued a letter of reasonable assurance. Enclosed is the copy of Mr. Bomberger's letter to you along with his financial documents, and a copy of the bank's letter of reasonable assurance.

Steil was reminded by Borsari in July 1991 of the sequence of the events in September 1989, leading up to the conclusions that Steil ultimately adopted in his testimony, *i.e.*, that he had "reviewed" Bomberger's financial documents and then he issued a letter of "reasonable assurance." (*Compare* Bomberger Exh. 3).

[22] Bomberger sought to rehabilitate Steil in reply findings. Bomberger quotes the key question and answer: Q. Neither you nor the bank have any documents in response to the request for Production F? A. Relating to the - - - can we go off the record for a second? Judge Sippel: No. A. Relating to the Bomberger loan, that's correct, the Bomberger loan request. (Steil, Tr. 43-44.) Bomberger argues that Steil was confused. (Bomberger's RPFC at 9.) But Bomberger could have recalled Steil to clarify this answer if Bomberger felt it could be rehabilitated. Bomberger's arguments seek to avoid the consequences of the fact of knowing non-compliance with a Commission subpoena and are rejected.

[23] The trial tactics of Borsari, as illustrated in two instances, reveal a recognition that the evidence was prejudicing his client's case as it evolved in open court. First, in a rehabilation effort Borsari attempted to have Bomberger testify as to what the bank (and Mr. Steil) intended to convey in the bank letter. (Tr. 114-18.) This was objected to and the objection was sustained. Second, after Bomberger admitted that he had orally asked Steil for an "accommodation" letter which was based on Bomberger's deposition testimony, Borsari attempted to have Bomberger testify on redirect as to what he intended with his deposition answers. (Tr. 215-16.) Borsari had never asked to have Bomberger excused before he went into those lines of questioning which were denied by the Judge. But the effort to rehabilitate Bomberger's case in that way illustrates desperation where an already unfavorable factual case is perceptively seen as becoming worse.

[24] *Cf. Colonial Communications, Inc.*, 6 F.C.C. Rcd 2296, 2297 (Comm'n 1991) (superior credit awarded to McNeil who lived in community of license for fourteen years and within service area for twenty years before filing her application). *See also Rebecca L. Boedker*, 6 F.C.C. Rcd 2557, 2558 (Comm'n 1991) (residence within proposed service area closely follows residence in principal community).

[25] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re Applications of	
MARIA M. OCHOA	File No. BPH-890615ME
GATEWAY MEDIA LIMITED PARTNERSHIP	File No. BPH-890616MN
FOOTHILLS BROADCASTING, INC.	File No. BPH-890616MR
For Construction Permit for a New FM Station on Channel 277A in Lenoir, North Carolina	

Appearances

Stephen T. Yelverton on behalf of Maria M. Ochoa; *James A. Kline, IV* on behalf of Gateway Media Limited Partnership; *Lawrence J. Bernard, Jr.* on behalf of Foothills Broadcasting, Inc.; and *James Shook* on behalf of Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 28, 1992; Released: March 9, 1992

PRELIMINARY STATEMENT

1. Initially eight applicants sought authority to operate a new FM station on Channel 277A in Lenoir, North Carolina. *See* 55 F.R. 50398 published December 6, 1990.[1] Three remain: Maria M. Ochoa (Ochoa), Gateway Media Limited Partnership (Gateway) and Foothills Broadcasting, Inc. (Foothills).

2. After a lengthy and intermittent interlocutory cycle had run its course, we took evidence[2] on the following issues:[3]

> 1: To determine whether Gateway is financially qualified to construct and operate its proposed station and whether it was so qualified on June 15, 1989, to the date the application certified to its financial qualifications;[4]
>
> 2: To determine whether Foothills lacked candor or misrepresented the facts regarding its ownership structure when they filed BPH-890616MP, and, if so, whether Foothills is of fit character to be a Commission licensee;[5]
>
> 3: To determine whether Foothills' two tier (voting and non-voting) ownership structure is a "sham," and if so what impact that has on their qualifications to be a Commission licensee;[5]
>
> 4: To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> 5: To determine, in light of the evidence pursuant to the specified issues, which of the applications should be granted, if any.

Both the burden of proof and the burden of proceeding on Issue 1 was placed on Gateway Media Limited Partnership. On Issues 2 and 3, the burden of proceeding was placed on Maria M. Ochoa, while the burden of proof remained on Foothills.

3. We held the Prehearing Conference on March 1, 1991, and the Evidentiary Admission Session on March 8, 1991. Hearings were held on March 19 and 20, May 1, 2, and 20, and September 26, 1991. The evidentiary record was closed on September 26, 1991.

4. The three applicants filed their first set of Proposed Findings of Fact and Conclusions of Law on July 5, 1991, and their first set of Reply Findings on July 19, 1991. They filed their second set of Proposed Findings on November 27, 1991, and their second set of Reply Findings on December 13, 1991.

Findings of Fact
Issue 1: Gateway Financial Issue

5. Under Issue 1 we must determine whether Gateway was financially qualified on June 15, 1989, at the time they certified they were. It was General Partner Susan Rowe, with 50% equity and 100% voting interests, who so certified.

6. Before Gateway filed its application, Susan Rowe estimated the cost to construct and operate the proposed station, added an "approximate buffer" to her estimates and decided to ask the bank for a $425,000 loan.

7. On May 31, 1989, Gateway's counsel telecopied a sample bank letter to Rowe. The sample letter stated in part: (a) the bank's "willingness to lend" the applicant a sum to be inserted by the bank; (b) an interest rate of "one to two percent above the prime rate; (c) that the loan would be "repayable over a period of four to six years;" (d) that the loan was subject to final review of the applicant's projection and a complete loan package supported by financial statements after grant of the application; and (e) that the loan would be subject to the bank's "customary covenants, terms, and conditions." Gateway Ex. 14, Att. B, p. 2.

8. So about two weeks before she certified Susan Rowe had a sample bank letter to give to a financial institution. But Susan Rowe didn't go to a financial institution. Instead, she contacted a neighbor of hers, Al Wood. Wood was a branch manager of the First Union National Bank in Lenoir. She told Woods about her plans. She told him she was interested in a $425,000 loan, she gave him the sample letter, and said she wanted a letter like the sample. The *only* document she gave Wood was the sample letter.

9. Wood said that he couldn't authorize commercial loans but that he would turn the matter over to Stephen McCord, First Union's Commercial Banking Manager for Lenoir. Wood never met with McCord about Gateway's

request for a loan letter. Instead, he telephoned McCord and sent him the letter. Wood and McCord had one or two brief conversations. Wood told McCord that Rowe wanted to obtain a radio station and needed a letter stating the bank's "interest" in providing funds. Foothills Ex. 6, p. 8.

10. At the time he was considering Gateway's request for a loan letter McCord had never met Rowe, and he had no meetings or telephone conversations with her during the time he was considering and responding to Gateway's request. Foothills' Ph. II, Ex. 6, p. 5.

11. Susan Rowe has testified differently. At the March 19, 1991 hearing session, she testified at some length concerning meeting at the bank with McCord before Gateway received its loan letter. (Tr. 182-188). She said that they had talked about an interest rate "spread over prime;" that she told him Gateway would need "X" dollars; that she asked him to prepare a bank letter; and that McCord had asked her if her husband would back her in the project and that she had replied that he would. (Tr. 182, 183, 186-188).

12. However, a short time later, when she was deposed on April 9, 1991, she first testified that she had not met with McCord to talk about a letter. Then she said that she may have talked to McCord, but didn't remember the conversation. Foothills Ph. II Ex. 7. pp 6 and 19. Thus we have Ms. Rowe giving three different versions of a key event, inconsistent versions on a key element of proof.

13. On June 6, 1989, McCord wrote two letters for Gateway. In the first letter McCord referred to the bank's "willingness to consider a loan request." After he wrote this first letter he had a telephone conversation with Gateway communications counsel (see para. 7 *supra*.) They talked about the language in the letter. McCord then wrote a second letter also dated June 6, 1989. This referred to the bank's "willingness to lend" Gateway money.

14. The first letter also contained this sentence: "This letter should not be construed as a commitment to lend." The comparable sentence in the second letter reads: "any commitment to lend is expressly subject to the borrowing entity meeting all terms, conditions and covenants the bank may deem appropriate." McCord says, that in his mind, those changes in the letter didn't effect its substantive meaning at all.

15. During his telephone conversation with Gateway's counsel (see Finding 13 *supra*.), McCord discussed possible interest rates and repayment terms. But McCord refused to include such terms in his second letter; he was "uncomfortable" including those terms in the letter without having seen "the total deal;" and because he hadn't seen a lot of detailed information that he expected to get in the future. Neither of the McCord's letters contained any language about security for the proposed loan. When he agreed to write the letters, McCord was mistakenly assuming that Rowe's husband, Bill White and Hoffman's husband Eric would be involved in Gateway. *See* Foothills Ph. III Ex. 6, p. 5.

16. Gateway admits that before they filed their application, they didn't provide First Union with any documents describing their financial plans for construction and operation of the proposed station or with financial statements for the application or its principals.

17. Gateway filed its application in this proceeding on June 16, 1989. There Susan Rowe (who really had nothing to do with the terms of the two McCord letters) certified to Gateway's finances. She swore that Gateway had "sufficient net liquid assets on hand and that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." In so doing she was relying on the second bank letter. Gateway did not rely on the availability of money from other sources.

18. Since Susan Rowe hadn't talked with McCord, she didn't know that there were a great many impediments to Gateway's obtaining a $425,000 loan. *See* Finding 6 *supra*. For example, she didn't know that it is First Union's standard practice to require borrowers to provide equity contributions equal to 25% of the real estate value and 20 to 25% of the value of equipment to be purchased with the loan proceeds; she didn't know that First Union doesn't make *long term loans* for working capital; she didn't know that before First Union will make a commercial loan, they conduct a study of the potential cash flow of the business to determine if it is likely to generate adequate funds for repayment; and she didn't know that McCord didn't have the authority to approve a $425,000 loan.

19. Under *Aspen FM, Inc.*, FCC 90R-37 released May 23 1990 at paras. 15-17 and *Shawn Phalen*, FCC 90R-64 released July 24, 1990, Gateway must also prove they are *presently* financially qualified.

20. On January 10, 1991, Foothills moved to enlarge the issues against Gateway. That motion was granted. *See* Footnote 4 *supra*. At that time McCord prepared still another letter for Gateway. This letter, dated January 18, 1991 contained the items missing from the June 6, 1989 letter. There is a specific interest rate (1.5% above prime) a repayment period (beginning 30 days after the loan is issued, and not to exceed seven years) and guarantee and collateral requirements (all the station's assets and appropriate personal guarantees).

21. Most importantly, Mrs. Rowe's husband, Mr. William White, III, has *now* personally guaranteed (in writing) a loan from First Union to Gateway to construct and operate the proposed station. *See* Findings 11 and 15 *supra*. White is a Vice-President of Greer Laboratories Inc. Greer is a family owned and operated pharmaceutical manufacturer in Lenoir. They specialize in producing allergenic extracts and materials. First Union has long had financial dealings with Greer and is familiar with Mr. White's personal financial status. However, a prenuptial agreement governs William White's and Susan Rowe's marriage. So White's personal *written* guarantee, becomes significant.

22. *Intermediate Financial Findings*. Based on the foregoing (Findings 19-21 *supra*.) a further finding is warranted that Gateway is *presently* financially qualified. They have shown that they *now* have sufficient net liquid assets available from a committed source to construct and operate the requested facilities for there months without revenues. The First Union January 18, 1991 loan commitment letter buttressed by William White, III's personal guarantee provides the forward looking assurance Gateway needs.

23. But, under *Aspen FM, Inc. supra.*, and *Shawn Phalen*, Gateway has both a forward-backward obligation. They must also demonstrate that they were financially qualified on June 15, 1989 when they certified they were. *See* Finding 5 *supra*. based on the foregoing (Findings

6-18 *supra.*), the further finding is warranted that Gateway wasn't financially qualified on June 15, 1989, when Susan Rowe certified they were.

24. On June 15, 1989, Gateway did not have sufficient net liquid assets on hand. Susan Rowe knew that at the time she was certifying. Nor, on that date, did Gateway have sufficient funds available from *committed* sources to construct and operate the requested facilities for three months without revenue. Susan Rowe knew that too, or should have known it.

25. Ms. Rowe had never met Stephen McCord of First Union, the person her neighbor, Al Wood, had selected to provide Gateway with a loan commitment letter. She knew she needed $425,000, but she didn't know if this Stephen McCord was authorized to approve a loan in that amount (see Findings 6 and 18 *supra.*). Since she had never personally dealt with either McCord or First Union, Rowe knew that Gateway had never provided First Union with the background financial documents McCord would need to draft a meaningful loan commitment letter.

26. Moreover, had Susan Rowe compared the sample loan letter her communications counsel had given her with McCord's second June 6, 1989 letter, she would have readily seen the McCord letter for what it was - a mere accommodation, and not a very good one at that.

27. So, just as surely as Gateway is financially qualified *now*, Gateway wasn't financially qualified on June 15, 1989, when the sole General Partner, Susan Rowe certified that they were. So Issue 1 is decided adversely to Gateway, and Gateway is not qualified to be a Commission licensee.

Issues 2-3: Foothills' Sham and Misrepresentation Issues

28. Foothills filed its Lenoir application on June 16, 1989. There they represented to the Commission, their opponents (see Footnote 1, and Finding 1 *supra.*), and the public that they were a North Carolina two-tier stock corporation (common voting and common non-voting). The following chart shows the details (foothills Ex. 1):

CHART

Stock-holder	Voting Shares(%)	Non-voting Shares(%)	% of Equity
John B. Beall	900 (182%)	0 (0%)	45%
Steven Frank	200 (18%)	0 (0%)	10%
W. Wallace Respess	0 (0%)	900 (100%)	45%

29. John Beall is ostensibly the President, Treasurer and a Director of Foothills; Steven Frank is Vice-President, Secretary and a Director; and Mr. Respess claims to be neither an officer nor Director, nor a voting stockholder.

30. Foothills' formational problems are legion. To start with, although the chart (para. 28. *supra.*) shows Steven Frank holding 200 shares of voting stock, Foothills' application says he holds 900 shares of voting stock. This discrepancy has never been corrected in the application.

31. Foothills never signed or cannot find fully-executed copies of several important corporate documents. This includes stock subscription agreements,[6] annual meeting minutes, and federal business filings.

32. Foothills never amended its application to accurately reflect a change in Mr. Respess' residential address. Such formational documents that Foothills has produced clearly evidence backdating to the time the application was filed; i.e., they demonstrate that Foothills was not a legal corporate entity on June 16, 1989 (the filing date).

33. Foothills was unable to produce a fully-executed site agreement letter, and they never paid the proposed site owner the option fee required by the site contract until 2 or 3 weeks before the hearing began. Foothills claims to have held an annual corporate meeting in 1990. But no corporate minutes for that meeting were ever produced (Tr. 278, 323-324).[7]

34. Even the documents Foothills have been able to produce do little to explain their formational problems. Foothills' Articles of Incorporation are dated June 15, 1989. But the stock certificates for Foothills' three owners are dated June 14, 1991 (2 years later). Foothills' organizational meeting's minutes say the meeting was held on June 15, 1989, but those same meeting were executed the previous day, June 14, 1989.

35. While Foothills represents itself as existing on June 16, 1989, that is not consistent with the stockholders' checks for their initial stock purchases. Respess' check is dated June 16, 1989; Beall's is dated June 19, 1989; and Frank's is dated July 3, 1989.

36. Nowhere is the evidence of backdating (see Finding 32 *supra.*) clearer than is displayed in a legal bill Foothills received for its corporate organizational formulation. Wallace Respess, an alleged passive non-voting stockholder (45% equity), is also an attorney-at-law. He is a partner, and a 40% owner of Todd, Vanderbloemen, Respess and Brady, a law firm in Lenoir, North Carolina.

37. It was Respess who retained his own law firm to be Foothills' corporate counsel. On October 2, 1989, Respess' firm forwarded a bill for services rendered to Foothills. That bill shows that Respess' partner, Bruce Vanderbloemen, performed a series of corporate organizational acts for Foothills on September 12, 1989 - about three months *after* Foothills represented that it was a corporation *en esse*.

38. On September 12, 1989, Vanderbloemen held an organizational conference with Beall, Frank, and Respess; he completed and issued the stock certificates; he prepared the Initial Franchise Tax Return and forwarded it to Raleigh; he completed the organizational meeting minutes; and he completed other corporate documents.[8]

39. John Beall agrees that the September 12, 1989 date is accurate; the local register of deeds' date-stamp of September 28, 1989 on the Articles of Preparation is consistent with Vanderbloemen's bill; Beall has noted on the legal bill that he paid it on October 20, 1989; the tendered check is dated October 1989, not June 1989; and Vanderbloemen sent Foothills a memorandum on September 29, 1989 regarding the availability of the corporate name.

40. In addition to the legal services his law firm has performed, and although he is ostensibly a non-voting, passive stockholder, Wallace Respess has been anything but passive. He has actively participated in the prosecution of Foothills' application.

41. He recruited a rebuttal witness to Maria Ochoa's case, Jake Gurley. He talked with Gurley on the telephone, drafted an affidavit for Gurley's signature, and

directed Steven Frank (a voting stockholder) to go to Charlotte, North Carolina and get Mr. Gurley's signature on an affidavit.

42. Respess was also instrumental in recruiting another Ochoa rebuttal witness, Mrs. Rita Thorne. He first tried to get Mrs. Thorne to sign a written statement; she refused. So he secured her testimony by arranging for her to be served a subpoena *ad testificundum*. Respess personally paid the airfare for Gurley, Thorne, and a third person to come to Washington, D.C. and testify.

43. Respess also initiated and handled settlement negotiations for Foothills. He has handled several such negotiations. In fact, at the scheduled February 5, 1991 settlement conference, Respess was Foothills' chief spokesman and negotiator. He not only did most of the talking he was oblivious as to whether Steven Frank (Finding 41 *supra*.) was even present during all the meeting.

44. Respess has performed other prosecutorial activities on Foothills' behalf. He has sent application materials to Foothills' FCC counsel; and he confers regularly with Beall, Frank and FCC counsel. When important matters come up, Beall immediately contacts Respess for his advice; Beall only secondarily confers with Steven Frank. Beall received a copy of his deposition transcript directly from Respess. Either Respess or his law firm has directly turned over Foothills' documents to Foothills' FCC counsel without Beall's knowledge.

45. *Intermediate Findings*. Based on the foregoing (Findings 28-44 *supra*.), certain intermediate facts are warranted. First, Foothills' two tier (voting and non-voting) ownership structure is certainly and surely a sham. Foothills has represented that its two tier corporation legally existed on June 16, 1989 when they filed their application. It didn't. The corporation didn't come into being, if it came into being, until some three months later, on September 12, 1989, at the earliest (see Findings 38-39 *supra*.).

46. Foothills' principals were well aware that their corporate structure was a sham. The record contains evidence of backdating documents to make it appear that the corporation existed on the date the application was filed. *See* Findings 32, 34-39 *supra*.

47. Moreover, the argument can be made that Foothills has never established itself as a *bona fide* corporate applicant. The FM application contains discrepancies that have never been corrected. Foothills' principals never signed or cannot find fully executed copies of vital corporate documents. This includes stock subscription agreements, annual meeting minutes, and federal business filings. Findings 30-33 *supra*.

48. Foothills has been representing and continues to represent that Wallace Respess (45% equity) is a non-voting, passive investor. *See* Finding 28 *supra* That's a blatant and overt misrepresentation. Respess has been anything but passive. Actually the record supports a contrary inference; i.e., that the Lenoir FM venture is Respess' venture, that he is the moving and driving force behind the Foothills application, and that Beall and Frank follow his guidance.

49. In sum, Foothills' two tier (voting and non-voting) ownership structure was a sham on June 16, 1989 when it was filed. It remains a sham. Moreover, Foothills knowingly misrepresented the facts about its ownership structure when they filed BPH-890616MP. Issues 2 and 3 will be decided adversely to Foothills.

Issue 4 : The Standard Comparative Issue
Description Of The Applicants

50. *Maria Ochoa*. Ochoa is an individual applicant. She will be the 100% controlling party and owner of the Lenoir FM broadcast application. No other person or entity has any understanding or agreement to acquire any ownership or controlling interest in her proposed station.

51. *Gateway*. Gateway Media Limited Partnership, organized and existing under North Carolina law has the follow structure:

CHART

Partner	Type of Partner	Ownership Interest	Voting Percentage
Susan L. Rowe	General Partner	50% equity	100%
Margaret W. Hoffman	Limited Partner	50% equity	0%

52. Ms. Rowe controls 100% of the applicant. No other person or entity has any understanding or agreement to acquire any ownership interest in Gateway's FM proposal.

53. *Foothills Broadcasting, Inc*. The Foothills' ownership structure is set out at Findings 28-29 *supra*. and will not be repeated here.[9] Ostensibly they have two voting shareholders: John Beall has 900 shares of voting stock (82%) with a 45% equity; and Steven Frank 200 shares (18%) with a 10% equity. The other stockholder, W. Wallace Respess is ostensibly a non-voting stockholder holding 900 shares of non-voting stock and a 45% equity.

Diversification of Mass Media

54. *Ochoa* has no media interests. Neither *Gateway* nor either of its partners have any interest in any medium of mass communications. Neither *Foothills* nor any of its principals have any interest in or association with existing media.

Best Practicable Service
Ochoa's Effectuation Problem

55. Both Foothills and Maria Ochoa face serious integration effectuation problems. The sham aspects of Foothills proposal have already been covered under Basic Qualifying Issues 2 and 3. *See* Findings 28-49 *supra*. But since no sham issue has been designated against Ochoa, and since none of her opponents have even requested such an issue against her, her effectuation problem becomes relevant to the standard comparative issue, and will be considered under that issue. *Maria Ochoa* claims 100% quantitative integration based on her sole-proprietorship. Before we set out the details supporting that claim, we must address a serious and substantial attack Ochoa's opponents have levied at her integration claim. In essence, her opponents claim that she never intended to carry out her integration pledge.

56. When she filed her FM application on June 15, 1989, Ochoa was general sales manager of Station WMXC-FM, Charlotte, North Carolina. She pledged to divest this interest and sever all connections with WMXC before commencement of program test authority for the

Lenoir station. In her direct case exhibit, she also claimed that she would move to Lenoir if her application was granted, and therefore claimed a preference for future local residence.

57. At a hearing session held on March 19, 1991, Ochoa said that she had told Jake Gurley, her immediate supervisor at WMXC that she was filing for Lenoir, and that she proposed to move to Lenoir and sever her connection with WMXC if her Lenoir application were granted. She also testified that she told her co-workers, as well as the executive vice president and the president of the licensee of WMXC, Allan Box, the same things (Tr. 80-82, 103).

58. Ochoa terminated her WMXC employment on January 22, 1991. Gurley was her supervisor until about the last 90 days of her employment. On October 15, 1990, about 90 days before Ochoa left the company, a new General Manager Rita Thorne replaced Gurley. At the March 19, 1991 hearing session Maria Ochoa said that she had talked with Thorne about her Lenoir application and had told Thorne that she (Ochoa) intended to leave WMXC if the application was granted.

59. Also, on March 19, 1991, Ms. Ochoa was asked if she had investigated any opportunities to acquire other media interests. She said she had not. Then she was asked if she had had any discussions with anyone about having an ownership interest in any other media. She said she had not (Tr. 108-109).

60. Then she was asked if she specifically recalled talking with Jake Gurley in the summer of 1990 about becoming a stockholder in a group he was forming to purchase WMXC and two other stations that E-Z Communications owned. She did remember that (Tr. 109), but she said the group's offer "never came to be, because it was rejected," and she didn't take her potential participation seriously because ". . . it was all very speculative." However, she did admit that during her discussions with Gurley she told him that if the group was able to purchase WMXC and the two other stations, she would continue to work at WMXC after the purchase. On the other hand, she says that during those discussions her then-pending Lenior application or her intention to move to Lenior were never mentioned.

61. During her initial appearance on March 19, 1991, Ms. Ochoa denied ever telling Gurley that she had no intention of moving to Lenior (Tr. 113); she denied telling Gurley that she planned to dismiss her application for a settlement payment (Tr. 113); she denied telling Gurley that she thought that her status as a female and minority would make her chances of winning so strong the other competing applicants would pay her to dismiss her application (Tr. 113); and she denied ever telling Gurley that in the unlikely event her application was granted she would sell the station (Tr. 113-114).

62. Ms. Ochoa was then shown a sworn statement of Mr. Gurley's where he averred that she had told him these things. She *again* unequivocably denied ever having given Gurley the information set out in para. 61 *supra*. (Foothills Ex. 7; Tr. 116-117).

63. She also denied having told Gurley that she would continue to work at WMXC as part of the group who was proposing to buy the station and two other stations (Tr. 117). But a short time later she conceded that she had agreed (albeit on a very speculative basis) to go into business with Gurley if he bought WMXC (Tr. 120).

64. Faced with the directly contradictory record; i.e., Gurley-Ochoa inconsistent statements, the Trial Judge permitted rebuttal. He did not want either the Review Board or ultimately the Commission to be faced with resolving a "one-on-one" situation (Tr. 241-243; 433-436).

65. Rita Thorne, the WMXC General Manager during Ochoa's final days at the station, testified. She (Thorne) stated that she had had the occasion to ask Ochoa if she intended to leave WMXC and move to Lenoir to work at the new station if her application was granted (Tr. 359).

66. According to Thorne, Ochoa told her that she did not intend to leave WMXC if her Lenoir application was granted, but would continue to live in Charlotte and work at WMXC indefinitely (Tr. 360-361, 372-373). Ochoa told Thorne that she didn't intend to obtain the Lenoir station that she was not going to go that far, and that if her application was granted she would sell the station (Tr. 361, 372, 377-388). Thorne says she believed Ochoa, that Ochoa never intended to prosecute the application to a grant.

67. Edward R. Jablonski aka Johnny Jacobs testified at the May 1-2, 1991 rebuttal sessions. Jablonski, WMXC's local sales manager from October 1989 to the present time, stated that Maria Ochoa had been his superior until she left the station (Tr. 600-601). He says that in late 1989, he had a conversation with Ms. Ochoa about her Lenoir application. He says that during that conversation Ochoa indicated that she did not intend to leave WMXC if her Lenior application were granted, that she had no desire to move to Lenoir, and that she did not intend to do so. She also told Jablonski that she intended to settle the Lenoir proceeding in return for a payment (Tr. 603-604, 606).

68. Jablonski also says that on another occasion Ms. Ochoa told him that she intended to go to hearing on the Lenoir application, but that her long-term goal was to be WMXC's general manager (Tr. 605-606).

69. Susan Litaker, WMXC's Business Manager since November 1989, also testified at the rebuttal hearing. Litaker says that on one occasion, and in Jake Gurley's presence, she asked Maria Ochoa why she wanted a station in Lenoir when she had a good job in Charlotte. Litaker says that Ochoa replied that she didn't want to run the Lenoir station, she merely wanted to file the application and sell it (Tr. 741-744).

70. Ms. Litaker says she mentioned the Lenoir application to Ms. Ochoa on other occasions. According to Litaker, in one of these conversations Ochoa said she had no intention of constructing a station in Lenoir; in another conversation she said that she had no intention of moving to Lenoir (Tr. 744-748, 752).

71. About a month after Thorne became WMXC's general manager, she came to Litaker. She asked Litaker whether Ochoa intended to leave WMXC and go to Lenoir. Litaker thought Ochoa had told the truth when she told her (Thorne) that she (Ochoa) planned to say at WMXC. Litaker told Thorne that what Ochoa had told her (Thorne) was consistent with what she told Litaker (Tr. 760-762).

72. Jake Gurley (see Findings 57-62 *supra*.) testified at the rebuttal. He confirmed the averments he had previously made in his declaration. He was WMXC's General Manager from 1987 until September of 1990. He originally hired Ochoa for a sales person position. Later he promoted her to local sales manager. He says Ochoa

told him that she had filed the Lenoir application shortly after her application was filed, but she assured him that she did not plan to leave WMXC. Rather, Ochoa said she planned to dismiss her application in return for a settlement (Tr. 653-654).

73. At the rebuttal session, Maria Ochoa presented the testimony of Silvia Pinson, a Lenoir real estate person. Pinson says that in May and June 1989 she helped Ochoa locate a transmitter site. She also drove the Ochoas through certain areas of Lenoir to show them houses. But they didn't go into any of the houses. Ms. Ochoa told her that if she (Ochoa) received a grant, the Ochoas would move to Lenoir.[10]

74. Ochoa's husband, David, also testified. He says that to the best of his knowledge Maria intended to move to Lenoir and run her proposed station if her application was granted (Tr. 909). He says that he doesn't believe his wife said any of the things described in Gurley's statement (see Foothills Ex. 7, and Findings 60-61 *supra*.). He even believes that Thorne, Jablonski, Gurley and Litaker *all* lied in their testimony about Ochoa's statements to them that she did not intend to construct the Lenoir station or move to Lenoir (Tr. 909-911). However, he was unable to provide a convincing rationale for his belief (Tr. 910-914).

75. At her counsel's request Maria Ochoa remained in the hearing room while Jablonski, Litaker, and Gurley testified (Tr. 594-596, 782). She was also permitted to testify again at the conclusion of the rebuttal session. During the course of this later testimony she substantially changed and revised much of the testimony she had given at the March 19, hearing session. She said that when she talked to Gurley and Thorne about her Lenoir application she deliberately cast all her statements in the negative. She told them that the process would be long, the case might be settled, and that there were a number of applicants. She said she did this because she wanted to protect her job at WMXC, and she wanted to show them that she was going to be a "long term player" at the station (Tr. 970-971, 989, 1000). She now concedes that she probably misled Gurley, Thorne, Litaker, and Jablonski about her intentions regarding the Lenoir station and staying at WMXC because she wanted them to believe that she intended to stay at WMXC (Tr. 1001-1002).

76. *Intermediate Facts*. First, Maria Ochoa has failed to meet her burden of proof. She has failed to persuasively demonstrate that she will move from Charlotte to Lenoir if her application is granted. She hasn't shown her integration pledge to be *bona fides*.

77. At the time she filed her application she had no intention of moving to Lenoir. From the outset she has believed that her minority and female status would make her chances of winning so strong that her opponents would pay her handsomely to dismiss her application. She has even gone so far as to state that even in the unlikely event her application was granted, she would sell the station.

78. So, based on the foregoing, and under ordinary circumstances, Maria Ochoa would be denied any quantitative integration credit, and we would proceed from there.

79. But these are not ordinary circumstances. During the course of the hearing, Maria Ochoa has inserted an additional factor into the adjudicatory equation. We are now dealing with a principal who testified falsely in open hearing. Not only that, but when she was confronted with evidence that exposed her falsifications, she repeated them. It was only after much time, money, and effort were expanded, that she finally conceded that she had misled those individuals who had testified contrary to her falsities; i.e., Gurley, Thorne, Litaker and Jablonski.[11]

80. The Trial Judge can't grant such an applicant. It's true that no character issue has been set down against Ms. Ochoa. In fact neither of her opponents have even asked for one. But that is of no moment. An implicit character issue exists with respect to the truth and veracity of every witness who is a principal in a hearing case, or who is a person under a principal's control in a hearing case. Truth and candor are always in issue.

81. Issues are designated to place an applicant or licensee on notice of the charges he or she will be required to meet at the hearing. But notice to an applicant that he or she must testify truthfully and not conceal material information is superfluous. That's what the oath is for.

82. No unfairness results to hold that an applicant has knowingly assumed the risk of an adverse character determination, when she testifies falsely at a hearing. Maria Ochoa testified falsely in open hearing. Her application will be denied. *See Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971); *Grenco, Inc. et. al.*, 39 FCC 2d 732 (1973); *RKO General Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980) at 104 (para. 221); and *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990).

Quantitative and Qualitative Integration

83. *Maria Ochoa*. As previously noted, as sole proprietor, Maria Ochoa seeks 100% quantitative integration. She claims she will work full-time (at least 40 hours a week) as general manager of her FM station. Her 40 hours minimum will include the hours between 8:00 a.m. and 5:00 p.m., Monday through Friday.

84. As general manager she will direct the overall station operation; i.e., she'll set general policies to govern finances, sales, administration, and employment. She'll set and oversee programming policies. She will hire and fire all employees and she will administer and implement the station's equal opportunity program. She'll oversee the station's public relations and community outreach efforts. This includes overseeing the on-going ascertainment of local needs and interest.

85. Maria Ochoa, born Maria Victoria Martinez, was born on July 4, 1969, in Havana, Cuba. She grew up in Charleston, South Carolina, and became a U.S. Citizen in 1973. She currently *resides* in Charlotte, North Carolina, outside the proposed station's 1 mV/m contour. She asserts that she *will move to Lenoir* if her application is granted (but see paras. 55-81 *supra*.).

86. Ms. Ochoa *graduated* from the University of South Carolina in 1981 with a B.A. in Journalism. She has *past broadcast experience*. From January 1982 to August 1983, she was an Account Executive with stations WBZK-AM, and WDZK-FM, York, South Carolina. From August 1983 to April 1987, she was an Account Executive with station WEZC-FM, Charlotte, North Carolina.

87. In April 1987 she became Local Sales Manager for station WEZC-FM. From August 1988 to January 22, 1991, Ms. Ochoa was the General Sales Manager for WMXC-FM (formerly WEZC-FM), Charlotte, North

Carolina. Both as Local Sales Manager, and as General Sales Manager, Ochoa supervised sales persons and was responsible for hiring and firing.

88. From February 25, 1991, until the fall of 1991 (around October 30, 1991) she was senior account executive with station WGKL-AM and FM, Charlotte North Carolina. But starting in the fall of 1991, she left broadcasting. She has started sales activity with the New York Life Insurance Company looking toward becoming a New York Life agent.

89. Maria Ochoa hasn't been *civically active* within the proposed station's 1 mV/m contour. But she does claim those comparative enhancements due a White, *Hispanic female*.

90. *Gateway*. Gateway claims 100% quantitative integration based on the proposed day-to-day integration of their sole general partner, Susan Rowe. Rowe has a 50% equity interest and 100% voting interest in Gateway. She proposes to work full-time (at least 40 hours a week) as General Manager of the proposed station.

91. As General Manager, she will supervise all aspects of the station's day-to-day operation. This will include hiring and firing personnel, setting station policies on employment, financial sales, and the administrative aspects of the station's operation. She will determine the programming, administer and implement the station's equal opportunity program, and assume responsibility for complying with the FCC's regulations. She will oversee the station's public affairs and community involvement activities. This includes ascertaining local needs and interests for programming. Ms. Rowe has no other employment or business obligations which might conflict with her integration pledge.

92. Susan Rowe was born on June 13, 1961. She moved to Caldwell County (where Lenoir is located) in August 1983, and lived there until March 1986. Although she didn't live within the Lenoir city limits at that time, her residence was within the proposed city-grade contour of the station. From March 1986 until January 1987, she lived within the Lenoir city limits. She then left the area for about 18 months. She returned to Lenoir in July 1988 and has resided there ever since. She currently resides at 111 Maple Drive in Lenoir.

93. Ms. Rowe holds a Bachelor of Science degree in finance from Clemson University in Clemson, South Carolina. Her employment background is in accounting and finance. She has worked in the accounting departments of the Uniroyal-Goodrich Tire Company, Sealed Air Corporation, and Bernhardt Furniture Company. She is presently a temporary, part-time Cost Accountant with Greer Laboratories, Inc. (see Finding 21 *supra*.).

94. Susan Rowe has no *past broadcast experience*. However, she does have some *civic participation* within the city of license. From 1984 until January 1987 she was active in the Lenoir Business and Professional Women's Club (BPW). She was Assistant Treasurer and Chairperson of BPW's finance committee. She was BPW's Treasurer from June 1986 to January 1987.

95. Since the fall of 1984, except for January 1987 to July 1988, Ms. Rowe has been an active member of St. James Episcopal Church in Lenoir. She has taught Sunday School and participated as a lay reader. Since August 1988, Ms. Rowe has been a dues-paying member of the Fairfield Neighborhood Association. She currently organizes and participates in waste recycling efforts in Fairfield Neighborhood on a monthly basis.

96. Susan Rowe claims those comparative enhancements due a White, non-Hispanic female.

97. *Foothills Broadcasting*. Foothills claims only *part-time* integration. They premise their claim on a proposal to integrate their two voting stockholders: John B. Beall, and Steven Frank. *John Beall* (82% voting, and 45% equity) is the President, Treasurer and Director of Foothills. *Steven Frank* (18% and 10% equity) is Vice President, Secretary, and a Director.

98. First, Foothills will integrate John Beall into its proposed day-to-day operation *part-time*. Beall will serve as General Manager of the proposed station 20 hours a week (minimum). As the part-time General Manager Beall will be solely responsible for developing and implementing all station financial and sales policies. He will work with the other integrated stockholder, Steven Frank, to jointly develop program policies. Beall will ultimately hire, fire, and promote all non-programming department employees, and supervise those employees on a daily basis. Typically he will work at the station from 8: a.m. to noon each weekday.

99. John Beall was born on March 18, 1948. Except for the four years he attended college he has lived in Lenoir all of his life.

100. Beall presently owns part of and is the Chief Operating Officer of both Beall Oil Corporation and BCW, Inc. of North Carolina. Beall Oil and BCW are related entities that operate retail gasoline, oil and convenience store businesses. In order to meet his part-time integration commitment Beall plans to assign some of his present duties at Beall Oil and BCW to Mr. Robert Haus. Haus has 25 years of experience in similar businesses, has been an employee of Beall Oil for four years, and is presently Sales Manager of that organization.

101. John Beall has no *broadcast experience* but he has been *civically active* in Lenoir. From 1980 to 1984 he was a Deacon of The First Presbyterian Church of Lenoir, and from 1989 to the present he has been an Elder there. From 1984 to 1988 he was on the Board of Directors of the Caldwell County Chamber of Commerce; from 1986 to 1990 he was a member of the Caldwell County Board of Commissioners, and Chairman of the Board in 1988 and 1989; from 1985 to 1989 he was a Trustee of Caldwell Community College and Technical Institute; from 1985-1990 he was a member of the North Carolina Energy Policy Council; and from 1985 to the present Beall was a member and Founding Chairman of the Board of the Caldwell County Economic Development Commission.

102. John Beall is a White, non-Hispanic male. So he's not entitled to any minority or female comparative enhancements.

103. Second, Foothills will integrate 10% equity holder and 18% voting shareholder, Steven Frank, full-time into their proposed day-to-day operations. Frank will serve at least 40 hours per week as Program-News Director. In that capacity he'll be responsible for the content of all station programming. That includes entertainment, news, and public affairs. He will supervise all program department employees on a daily basis. He will resign from his current employment before Foothills' station starts operating.

104. Steven Frank was born on October 20, 1952. He has lived in Lenoir continuously since August of 1981, and currently *resides* at 151 Mayhill Place, Lenoir.

105. Mr. Frank has *past broadcast experience*. From January to May 1977 he was an Announcer/Salesman at station WDBM(AM), Statesville, North Carolina. Then in 1977-1978, he was a Newsman, Public Affairs Announcer at WBUY/WIXN(AM & FM), in Lexington, North Carolina. In 1978 Frank moved to Roanoke Rapids, North Carolina where he was the News and Public Affairs Director for WCBT(AM). He stayed there until 1981. In 1981, he became News Director for WJRI(AM) in Lenoir, where he remained until 1987. At the same time in 1983 he became a part-time News Reporter for WSOC-TV serving Caldwell and western North Carolina counties. He worked for WSOC-TV until 1988. For a short while, November of 1987 until January 1988 he was General Manager of WKGX(AM) in Lenoir. From July 1987 to the present time he has been a Contract Employee, a News Reporter for WSOC-TV, Charlotte, North Carolina. As when he worked for WSOC-TV part-time his beat is Caldwell and other western North Carolina counties.

106. Steven Frank has participated in some *civic activities* within the proposed station's 1 mV/m contour. Between 1982 and the present he has co-produced several slide-tape/video-tape programs about historic events in Caldwell County for showing in local schools. In 1983 he served on the Board of the Caldwell County (Lenoir) Arts Council.

107. From 1983 - 1990, Frank was on the Board of Directors of the Lenoir Crimestoppers. He has produced video programs for civic club presentations, coordinated press releases on organization activities, presented awards to persons reporting crimes and assisted law enforcement officials in investigating crimes.

108. Frank has been a member of the Caldwell County (Lenoir) Chamber of Commerce from 1984 to the present. In 1984 he wrote, produced, taped and edited a video program about Caldwell county. This was a joint project between the Chamber and the County Economic Development Commission. From 1989 to the present he has served on the committee which sponsors an annual 100 mile plus bicycle race in Caldwell County. He prepared publicity and photographs to publicize the event. From 1990 to the present he has been on the committee preparing for Caldwell county's sesqui-centennial celebration. It started in 1991.

109. Steven Frank is a white, non-Hispanic male, so he's not entitled to any minority or female comparative enhancements.

110. *Auxiliary Power*. All three applicants propose to use auxiliary power.

Conclusions of Law

1. Three applicants remain in the competition for FM Channel 277A in Lenoir, North Carolina: Maria M. Ochoa (Ochoa), Gateway Media Limited Partnership (Gateway), and Foothills Broadcasting, Inc. (Foothills).

2. We took evidence on four factual issues. Three of them are basic qualifying issues. Gateway faces a financial issue (Issue 1); and Foothills faces a misrepresentation (Issue 2), and a "sham" applicant issue (Issue 3). The fourth factual issue is the standard comparative issue (Issue 4).

3. Only basically qualified applicants are entitled to a comparative analysis. *See e.g. Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) *affirmed sub. nom. Guinan v. Federal Communications Commission*, 297 F.2d 782, 22 RR 2026 (1961). So before we examine the standard comparative issue, we must come to grips with Issues 1-3.

4. *Issue 1: Gateway's Financial Issue*. Under Commission and Review Board precedent, Gateway must make a forward-backward presentation. They must prove that they presently are financially qualified, and they must *also* prove that they were financially qualified on June 15, 1989 when they first certified that they were. *See* BPH-890616MN; *Aspen FM, Inc.*, FCC 90R-37, released May 23, 1990 at paras. 15-17; and *Shawn Phalen*, FCC 90R-64 released July 24, 1990.

5. Gateway has met the forward-looking test. They've proved that they are presently financially qualified; i.e., they have shown that they now have sufficient net liquid assets available ($425,000) from a committed source (First Union Bank) to construct and operate the requested facilities for three months without revenue. Findings 19-22 *supra*. The First Union January 18, 1991 loan letter when buttressed by William White III's personal loan guarantee provides the forward-looking assurance Gateway needs.

6. But just as surely as Gateway meets the forward-looking prong of the *Aspen-Phalen* two prong test, they fail the backward-looking test. Gateway wasn't financially qualified on June 15, 1989 when General Partner Susan Rowe certified they were. (*See* BPH-890616MN, Findings 5-18 and 23-27 *supra*.).

7. Stated simply, when Gateway filed their application on June 16, 1989, they didn't have sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. The First Union's [second] June 6, 1989 loan letter was defective and amounted to nothing more than an accommodation, and a poor one at that. In addition, meaningful loan guarantee letters weren't even in existence at the time.

8. The reason that Gateway can demonstrate that it was financially qualified the second time around, but didn't the first time around can be traced to General Partner Susan Rowe's conduct. She *bungled* the job the first time. She could have taken: (1) the $425,000 written construction and operation estimate she had prepared; (2) the sample bank loan letter communications counsel had given her; and (3) a written loan guarantee from her wealthy husband (William White III), and gone down to the First Union Bank. There she could have detailed what she needed with Stephen McCord and undoubtedly obtained a First Union loan letter identifical to the one she later obtained on January 18, 1991.

9. But Ms. Rowe didn't do that. Instead she took *only* the sample bank loan letter her counsel had given her, and approached a neighbor of hers, Al Wood. Wood was a Branch Manager of the First Union National Bank in Lenoir. She gave Wood the sample bank letter, told him she needed a letter stating the bank's "interest" in providing funds, and asked him to handle the matter. The net result was an accommodation letter that wouldn't pass Commission muster.

10. Now it isn't that Susan Rowe was dishonest. She was careless; she handled an important portion of Gateway's application in a sloppy manner; she botched the job. So Gateway must pay the price for Rowe's blunder.

Since Gateway has failed the backward portion of this *Aspen-Phalen* forward-backward test, they have failed to demonstrate that they're financially qualified and their application will be denied.

11. *Issues 2-3: Foothills' Sham and Misrepresentation Issues.* Issues 2 and 3 will both be resolved against Foothills. Foothills filed their application on June 16, 1989. There they represented to the Commission, to their opponents, and to the public that there existed a two-tier (voting and non-voting stock) corporation; that there were only three stockholders; and that two of the stockholders (Beall and Frank) were voting and active stockholders while the third (Respess) was a non-voting, passive shareholder.

12. These representations proved to be abjectly false. No such corporation legally existed on June 16, 1989. Foothills, if it legally exists at the present time, did not come into being until on or about September 12, 1989. That's when the corporate organizational meeting was held; that's when the stock certificates were completed;[12] that's when the Initial Franchise Tax Return was prepared and forwarded to Raleigh; and that's when other vital corporate documents were prepared.[13] In fact, the memorandum confirming the availability of the corporate name (Foothills Broadcasting, Inc.) is dated September 29, 1989.

13. Not only were the ownership structure representations contained in the June 16, 1989 application false, but Foothills' three stockholders were well aware they were false. The record is replete with the evidence that documents have been backdated to make it appear that Foothills Broadcasting, Inc. legally existed on June 16, 1989, when they filed their application.

14. Accordingly, the conclusion is warranted under Issues 2 and 3 that Foothills' ownership structure is a sham; that their three stockholders knew it was a sham; and that Foothills misrepresented the facts about their ownership structure when they filed BPH-890616MP.

15. Moreover, Foothills has misrepresented their ownership structure in another way. They have represented to the Commission, its opponents and the public that Wallace Respess, a 45% equity holder, is a passive, non-voting stockholder. Respess has been anything but. Wallace Respess is an attorney-at-law, a partner, and 40% owner of Todd, Vanderbloemen, Respess and Brady, a law firm in Lenoir, North Carolina.

16. Respess retained his own law firm to be Foothills' corporate counsel. It is Respess' partner, Bruce Vanderbloemen that organized Foothills. In addition, Respess has actively participated in the prosecution of Foothills' application. He recruited two rebuttal witnesses to Maria Ochoa's case; i.e., Jake Gurley and Rita Thorne. He personally paid the airfare for Gurley, Thorne and a third person to come to Washington, D.C. and testify.

17. Respess has initiated and handled several settlement negotiations; he has sent application materials to Foothills' FCC counsel; he regularly confers with Beall, Frank, and FCC counsel; Foothills' voting stockholder, and President John Beall immediately contacts Respess for his advice when important matters come up; Beall received a copy of his deposition directly from Respess; and either Respess or his law firm has directly turned over Foothills' documents to Foothills' FCC counsel without President Beall's knowledge. In fact, the conclusion is warranted that Foothills' Lenoir FM venture is primarily non-voting stockholder Wallace Respess' undertaking.

18. So the conclusion under Issue 2 must be that Foothills lacked candor with and misrepresented the facts to the Commission, their opponents and the public about their ownership structure when they filed BPH-890616MP; and that lack of candor and those misrepresentations render Foothills of unfit character to be Commission licensee.

19. Next, under Issue 3 the conclusion is warranted that Foothills' two tier (voting and non-voting) ownership structure is a "sham." Consequently, Foothills is not qualified to be a Commission licensee.

20. *Maria Ochoa.* Since neither Gateway nor Foothills are basically qualified to be a Commission licensee, one would think that that ends the matter; i.e., that the only basically qualified applicant, Maria Ochoa would be the winner. She faces no basic qualifying issues. In fact, neither of her opponents even ask for a basic qualifying issue against her. So under ordinary circumstances she would receive the grant.

21. But, as previously noted (Findings 78-81 *supra.*), these are not ordinary circumstances. During the course of the hearing Ms. Ochoa inserted an additional complexity into the adjudicatory equation.

22. She chose to testify falsely in open hearing. Not only that, but when she was confronted with her falsifications, she repeated them, and stood by them. It was only after Ochoa's opponents expended much money, time, and effort (in a rebuttal session) that Ms. Ochoa finally came clean. She finally conceded that she had deliberately misled those individuals, those individuals who were *subpoenaed*, who traveled to Washington, D.C., and who testified contrary to her falsities: (1) Jake Gurley; (2) Rite Thorne; (3) Susan Litaker; and (4) Johnny Jacobs.

23. Character issue or no character issue, this Trial Judge cannot grant such an applicant. He therefore must invoke the policy that both the Review Board and the Commission have used on similar occasions; namely, that truth and candor are always in issue. *See Nick J. Chaconas*, 28 FCC 231, 233 (1971); *Grenco Inc. et. al.*, 39 FCC 2d 732 (1973); *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980) at 104 (para. 221); and *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990).

24. Truth and candor are always in issue. An implicit character issue exists with respect to the truth and veracity of every witness (including Ochoa) who is a principal in a hearing case, or is a person under a principal's control in a hearing case.

25. Issues are designated to place an applicant or licensee on notice of the charges he or she will be required to meet at the hearing. But notice to an applicant (here Ochoa) that she must testify truthfully, and not conceal material information is superfluous. That's what the oath is for. Maria Ochoa took that oath.

26. No unfairness results to hold that Ochoa has knowingly assumed the risk of an adverse character determination, when she testifies falsely at a hearing. Maria Ochoa testified falsely in open hearing. Her application will be denied.

Ultimate Issue 5

27. Under the ultimate issue, and in the light of the evidence adduced pursuant to the specified issues,[14] we must decide "which of the applications should be granted, if any." The answer is none.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, Maria M. Ochoa is not of fit character to be a Commission licensee, and her application (BPH-890615ME) IS DENIED;

Gateway Media Limited Partnership was not financially qualified on June 15, 1989, and their application (BPH-890616MN) IS DENIED; and

Foothills Broadcasting, Inc. has filed a "sham" application and is not of fit character to be a Commission licensee, and their application (BPH-890616MR) IS DENIED.[15]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] Five of the eight were dismissed early on: (1) Mystic Radio Corporation (BPH-890906MQ) was dismissed on December 17, 1990 (FCC 90M-3982); (2) Sundown Communications (BPH-890612MI) and (3) Bowman Communications, Inc. (BPH-890616MK) on January 4, 1991 (FCC 91M-21); (4) Janet Lingafelt (BPH-890616MO) on January 7, 1991 (FCC 91M-38); and (5) Furniture City Broadcasters, Inc. (BPH-890616MM) on January 30, 1991 (FCC 91M-351).

[2] The case ended up being tried in three phases.

[3] In the interest of organization and clarity the issues have been renumbered and repositioned.

[4] *See* FCC 91M-625 released February 15, 1991.

[5] *See* FCC 91M-1663 released May 17, 1991.

[6] The stock subscription agreements that Foothills' produced are only partially executed and undated. *See* Ochoa Exs. 4, 5, and 6.

[7] Beall and Respess purportedly took out a bank note to fund the corporation's expense. But Foothills was unable to produce a copy of that note.

[8] Respess' firm via Vanderbloemen previously provided legal services for Respess, Beall, and Frank when they were owners in High Country Broadcasting. High Country was an FM applicant for Banner Elk, North Carolina. The Banner Elk application was dismissed pursuant to a settlement, the Foothills' principals made a profit on that settlement.

[9] At one time, and in the interest of giving the reader the entire picture in one place the Trial Judge would have repeated the facts in para. 28. However, the Review Board has disabused him of this practice. *See Shawn Phalen*, FCC 92M-164 released February 5, 1992 at Footnote 1.

[10] Ms. Ochoa also presented the testimony of WMXC's news editor, Karen Barnes. That testimony proved amorphous.

[11] Maria Ochoa apparently was able to convince her husband David that Gurley, Thorne, Litaker and Jablonski had *all* lied. *See* Finding 73 *supra*.

[12] The stock certificates for Foothills' three owners are dated June 14, 1991, two years after their application was filed, and over six months after this case was designated for hearing.

[13] The stock subscription agreements that Foothills finally made available for inspection and copying are only partially executed and undated.

[14] Note however that comparative findings have been made on all three applicants. *See* Findings 49-109 *supra* This means that if an appellate body determines that a standard comparison is necessary, all the data is there. No remand is needed. Stated another way, findings of fact have been made on *all* issues, and conclusions of law have been made on *all material* issues. *See WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkima Broadcasting Co.*, 30 FCC 932, 21 RR 732 (1961) at Footnote 2; *Sayger Broadcasting Co.*, 32 FCC 399, 22 RR 1059 (1962) at Footnote 7; 47 CFR 1.267(b) and 5 USC 557(c)(A).

[15] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revocation of License of

MICHAEL J. LABADIA
Amateur Radio Station
N2IFY

and

Suspension of License of

MICHAEL J. LABADIA
General Class Amateur
Radio Operator License

ORDER TO SHOW CAUSE AND SUSPENSION ORDER

Adopted: February 28, 1992; Released: March 9, 1992

By the Chief, Special Services Division, Private Radio Bureau:

1. Information before the Commission indicates that on March 29, 1991, the respondent, Michael J. Labadia, operated an unlicensed or "pirate" radio station identified as "Hope Radio International" on frequency 7411 kHz, in apparent willful violation of Section 301 of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. § 301.[1] Additionally, the information indicates that the respondent apparently repeated that violation on April 21, 1991, December 7, 1991, and/or February 16, 1992, despite being warned against such unlicensed operation on April 12, 1991. Last, the information indicates that on April 12, 1991, a Commission engineer requested the respondent's permission to inspect his amateur radio station, Commission call sign N2IFY, as well as any other radio transmitting apparatus located at the respondent's residence, and that the respondent refused to make his station available for inspection, in apparent willful violation of Section 97.103(c) of the Commission's Rules, 47 C.F.R. § 103(c).[2]

2. In light of Labadia's apparent violations of the Communications Act and the Commission's Rules, we propose to revoke his amateur service station license, and are suspending his operator license. Section 312(a)(2) of the Communications Act, 47 U.S.C. § 312(a)(2), gives the Commission authority to revoke station licenses on the basis of matters coming to the Commission's attention which would have prevented granting the original application for the license. Section 312(a)(4) of the Communications Act, 47 U.S.C. § 312(a)(4), gives the Commission authority to revoke station licenses for willful or repeated violation of the Communications Act or the Commission's Rules. Section 303(m)(1)(A) of the Communications Act, 47 U.S.C. § 303(m)(1)(A), gives the Commission authority to suspend a radio operator license for violation of the Communications Act or the Commission's Rules.

3. Labadia IS ORDERED, under Sections 312(a)(2) and (4) and 312(c) of the Communications Act, 47 U.S.C. §§ 312(a)(2), (4) and 312(c), to show cause why the captioned radio station license should not be revoked. If Labadia wishes to present evidence at an evidentiary hearing before an Administrative Law Judge, he must request a hearing within 30 days from the date of his receipt of this order. A time, place, and presiding Administrative Law Judge for such hearing will be designated later, by order. If Labadia does not request a hearing, the Commission will consider any written statement Labadia submits and will determine, without a hearing, whether revocation of his license is warranted. A form and a return envelope, intended to aid the respondent in replying to this order, is being served on the respondent simultaneous to the service of this order.

4. Additionally, Labadia's captioned operator license IS SUSPENDED under Section 303(m)(1)(A) of the Communications Act, 47 U.S.C. § 303(m)(1)(A), for the remainder of the license term. This suspension will be held in abeyance (until the case is decided) if Labadia, within 30 days of receiving this order, requests a hearing or submits a written statement concerning the suspension matter. If Labadia does not request a hearing or submit a written statement, the suspension will take effect 30 days after his receipt of this order.

5. Based upon the above information, this case will be decided upon the following issues:

(a) To determine whether the respondent Labadia willfully and/or repeatedly violated Section 301 of the Communications Act on March 29, 1991, April 21, 1991, December 7, 1991, and/or February 16, 1992.

(b) To determine whether the respondent willfully violated Section 97.103(c) of the Commission's Rules on April 12, 1991.

(c) To determine whether the respondent is qualified to remain a Commission licensee.

(d) To determine whether the captioned radio station license should be revoked.

(e) To determine whether the suspension of the captioned operator license should be affirmed, modified, or dismissed.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division
Private Radio Bureau

FOOTNOTES

[1] 47 U.S.C. § 301 provides, in pertinent part: "No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Terri-

tory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

[2] 47 C.F.R. § 97.103(c) provides: "The station licensee must make the station and the station records available for inspection upon request by an FCC representative. When deemed necessary by an EIC to assure compliance with the FCC Rules, the station licensee must maintain a record of station operations containing such items of information as the EIC may require in accord with §0.314(x) of the FCC Rules."

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 28, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL OPERATING COMPANIES' ONA AMENDMENTS ON CPNI

CC Docket No. 88-2, Phase I

On February 14, 1992, each of the Bell Operating Companies (BOCs) filed further amendments to their Open Network Architecture (ONA) plans pursuant to the *BOC Further Amendment Order*, 6 FCC Rcd 7646. In that Order, the Commission required the BOCs to describe any changes to their customer proprietary network information (CPNI) plans resulting from the modified CPNI requirement recently adopted in the *BOC Safeguards Order*, 6 FCC Rcd 7571. The BOCs were also required to describe changes to the multiline customer CPNI notification form, procedures for customers to authorize the release of their CPNI, and procedures for customers to restrict their CPNI.

In their amendments, two BOCs also address changes in their databases that are password/ID or otherwise restricted from access by BOC enhanced services marketing personnel. The Commission requested that the BOCs provide this information in their April 15, 1992 amendments, and we will seek comment on this issue after those amendments are filed.

Interested parties should file comments on the modified CPNI procedures and notices amendment by **March 16, 1992,** and reply comments by **March 26, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the amendments can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 2, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC BELL REQUEST FOR WAIVER AND BELL ATLANTIC PETITION FOR PARTIAL RECONSIDERATION OF CNA WAIVER ORDER

CC Docket No. 89-79
CC Docket No. 88-2

On February 20, 1992, Pacific Bell filed a waiver request to temporarily refrain from tariffing four BSEs for which permanent waivers were not granted in the January 31, 1992 ONA waiver order. Pacific requests that it be permitted to delay its tariffing of Calling Directory Number (CDN) Delivery via ICLID; CDN Delivery via BCLID; and Selective Call Acceptance until at least December 31, 1992. Pacific states that this delay is required because the common channel signaling (CCS) technology that supports these services is not yet completely deployed. Pacific also requests a waiver to refrain from tariffing DID Trunk Queuing until May 1, 1992 to permit it to undertake a technical feasibility study.

On February 21, 1992, Bell Atlantic filed a petition for partial reconsideration of the January 31, 1992 ONA waiver order. Bell Atlantic requests a waiver to refrain from tariffing Direct Inward Dialing (DID) and DID Trunk Queuing, claiming that the waiver is justified by the Commission's decision to permit NYNEX to refrain from tariffing similar DID services.

Interested parties should file comments on the petitions by **March 17, 1992,** and reply comments by **March 27, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-33

In re Applications of

CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.
(hereafter "Central")
Channel 202C3
Union Park, Florida — File No. BPED-881207MA

BIBLE BROADCASTING NETWORK, INC.
(hereafter "BBN")
Channel 202C2
Conway, Florida — File No. BPED-890412MJ

PALM BAY PUBLIC RADIO, INC.
(hereafter "Palm")
Channel 203A
Mims, Florida — File No. BPED-891127MB

SOUTHWEST FLORIDA COMMUNITY RADIO, INC.
(hereafter "Southwest")
Channel 202C2
Conway, Florida — File No. BPED-891127MC

MIMS COMMUNITY RADIO, INC.
(hereafter "Mims")
Channel 202C1
Oak Hill, Florida — File No. BPED-891127MD

HISPANIC BROADCAST SYSTEM, INC.
(hereafter "Hispanic")
Channel 202C3
Lake Mary, Florida — File No. BPED-891128ME

For Construction Permit for a New
Noncommercial Educational FM Station

HEARING DESIGNATION ORDER

Adopted: February 25, 1992; Released: March 10, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.[1]

2. *TV Channel 6 Interference.* On July 25, 1990, Florida Public Radio, Inc. (FPR) filed a Petition to Dismiss or Deny the applications of BBN, Southwest, and Hispanic alleging that their proposals would cause impermissible interference to Station WCPX-TV, Channel 6, Orlando, Florida, because they do not propose to collocate their antennas on the WCPX-TV tower. FPR urges that each of the applicants should conduct an interference study to predict the number of residences which would receive interference from the proposed facilities and that each should be required to obtain a corporate resolution from the licensee of WCPX-TV "irrevocably consent[ing]" to the applicant's technical proposal. Also on July 25, 1990, FPR filed a Petition to Dismiss or Deny the Central application, alleging that it did not contain a consent agreement from WCPX-TV.

3. Section 73.525 of the Commission's Rules requires new FM reserved band applicants to submit a written agreement with each affected TV Channel 6 station demonstrating the latter's concurrence with the proposed FM facilities, or else demonstrate that the predicted interference area resulting from the proposal contains no more than 3,000 persons.

4. In assessing the merits of FPR's petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Communications Act. The first test is whether a *prima facie* case has been made. If so, we next consider whether there is a substantial and material question of fact to warrant further inquiry. We find that FPR has not made a *prima facie* case but, even if it had, our review of FPR's petition in light of the responsive pleadings indicates there is no substantial and material question regarding the applicants' compliance with 47 C.F.R. § 73.525. First, in their applications as originally filed, BBN, Southwest, and Hispanic each submitted a copy of a letter from the Chief Engineer of WCPX-TV concurring in its technical proposal provided that the applicant cooperate and resolve all interference problems caused by the new station. On July 25, 1990, Central filed an amendment containing a letter from WCPX-TV agreeing in principal to allow Central to diplex onto the WCPX-TV antenna. FPR's petition fails to show *prima facie* that these various letters were unauthorized or were otherwise insufficient to prove concurrence by the television station. In any event, in response to the FPR petition's challenge to the adequacy of these letters: (a) BBN filed on August 22, 1990 a petition for leave to amend its application to change its transmitter site to now specify collocation on the WCPX-TV tower and diplexing on the WCPX-TV antenna, and to provide a letter from the Chief Engineer of WCPX-TV reaffirming its willingness to cooperate with

[1] Although the applications are apparently for five different communities, the interfering contour of each application overlaps the protected contour of at least one of the others. Since all the applications were timely filed and the grant of one would effectively preclude the grant of others, they are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

BBN; (b) Southwest opposed the FPR petition on August 22, 1990, attaching a letter from the WCPX-TV Vice President and General Manager, who reaffirmed that station's willingness to cooperate with Southwest and clarified that its Chief Engineer was indeed authorized to make technical decisions; on October 3, 1990, Southwest filed a petition for leave to amend to also propose collocation and diplexing with WCPX-TV and to demonstrate the latter's consent thereto; and (c) Hispanic opposed the FPR petition on August 22, 1990, providing a technical statement demonstrating that pursuant to the methodology set forth in 47 C.F.R. § 73.525(e) its proposal would not cause interference to WCPX-TV. In the light of these responses, we cannot find a substantial and material question of fact warranting further inquiry.

5. Furthermore, the petitions for leave to amend filed on August 22, 1990 by BBN and on October 3, 1990 by Southwest, although filed after the deadline for amending as a matter of right, *see* 47 C.F.R. § 73.3522(a)(2), demonstrate good cause; therefore, they will be granted and the amendments will be accepted, subject to the condition that any comparative upgrading resulting therefrom will be disallowed.

6. *Central and Hispanic*: Reclassified As C3. An engineering review of the Central application reveals that, although it applied as a Class C2 station, its 1 mV/m field strength contour extends only 37.6 kilometers, which is less than the Class C2 minimum of 39 kilometers. Similarly, Hispanic applied as a Class C2 station, although its 1 mV/m field strength contour extends only 36.5 kilometers. Accordingly, the Central and Hispanic applications have been reclassified as Class C3 stations. However, this change does not affect the acceptability for filing of these applications for noncommercial educational facilities.

7. *Radiofrequency Radiation*. Palm and Mims propose to locate their antennas on the existing WPGS(AM) tower. Both applicants note that a proposal exists to relocate the WPGS(AM) site as a condition of the proposed assignment of the station (File No. BAL-891019EB). However, that assignment application was dismissed on March 1, 1990, and, as of this date, no application has been filed requesting such a change. Regardless of whether the WPGS(AM) tower were to be moved, Palm and Mims must amend their respective applications to show compliance with 47 C.F.R. § 1.1307(b) after the radiofrequency radiation effects of the WPGS(AM) tower are included. [2] In addition, none of the applicants in this proceeding has addressed how it would protect workers, authorized access to the site, from levels of radiofrequency radiation in excess of the American National Standards Institute (ANSI) limit. Accordingly, each applicant must submit an amendment to its respective application which explains how its workers will be protected. Since the proposals of the applicants may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicants are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, the applicants will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the environmental assessments, that the respective proposals of the applicants will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted with respect to those particular applicants, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

8. *Time-Sharing*. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

9. *Amendments - §1.65*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
BBN	August 16, 1990; September 7, 1990; November 7, 1990; December 21, 1990; January 16, 1991; February 15, 1991; April 5, 1991; May 3, 1991; June 17, 1991 (as supplemented on June 18, 1991); July 22, 1991; August 26, 1991; October 7, 1991; November 7, 1991; December 20, 1991; and January 17, 1992.
Southwest	May 6, 1991 (as supplemented on May 13, 1991).
Hispanic	February 5, 1991.

[2] The radiofrequency radiation study must include the distance from the base of the tower to any fence surrounding that structure.

10. *Contingent Comparative Issue.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

11. *Comparative Coverage - Noncommercial.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to the above-mentioned applicants, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1.1319 of the Commission's Rules.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petition to dismiss or deny filed on July 25, 1990 by FPR IS DENIED.

15. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, the applicants shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

16. IT IS FURTHER ORDERED, That, as discussed in paragraphs 5 and 9 above, the petitions for leave to amend filed by BBN, Southwest, and Hispanic ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated therein.

17. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

DANA COMMUNICATIONS, LTD. File No. 10614-CL-P-314-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 314, Alabama 8 - Lee

RADIOPHONE CORPORATION File No. 10216-CL-P-413-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 413, Iowa 2 - Union

RADIOPHONE CORPORATION File No. 10187-CL-P-712-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 712, Wisconsin 5 - Pierce

21st CENTURY CELLULAR File No. 10344-CL-P-413-88
CC Docket No. 91-142

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 413, Iowa 2 - Union

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1992; Released: March 10, 1992

By the Commission:

I. INTRODUCTION

1. Petitions for reconsideration have been filed by Dana Communications, Ltd. (Dana) and Radiophone Corporation (Radiophone) (jointly, the Petitioners) regarding two Commission decisions which upheld dismissal of the captioned Rural Service Area (RSA) cellular applications. For the reasons stated below, we grant the petitions and reinstate and grant the applications.

II. BACKGROUND

2. The captioned applications were selected first in lotteries for the non-wireline cellular authorizations in the above-referenced RSAs. The applications were subsequently dismissed by the Mobile Services Division (MSD) and we affirmed.[1] We held that the Dana and Radiophone applications were unacceptable for filing because they failed to include the financial showings required by Section 22.917(c) of the Commission's rules.

3. On October 18, 1991, Petitioners filed petitions for reconsideration. Petitioners argue that the final version of the Commission's rules regarding personal or internal funding of RSA cellular systems, Section 22.917(c)(6),[2] was not approved by the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act of 1980 (PRA).[3] Petitioners contend that the Commission cannot dismiss an application for failure to comply with an unauthorized information collection requirement. This issue was not raised by petitioners prior to October 18, 1991.

4. An opposition to Radiophone's petition was filed by Thomas Domencich and the Committee for a Fair Lottery (Committee).[4] The Committee argues that the Commission's proposed financial rules were approved by OMB. According to the Committee, the Commission's final rule is not "substantively or materially" different from the proposed rule, and thus no further approval is required. The Committee also argues that Radiophone should not be given a second chance to demonstrate its financial qualifications, and that the Commission's final rule should be enforced, because the final rule has not been "affirmatively disapproved" by OMB.[5]

III. DISCUSSION

5. The PRA requires agencies to obtain approval from OMB before imposing a new or revised information collection requirement. *See* 44 U.S.C. Section 3507(a). Proposed rules are submitted to OMB and may be approved and assigned an OMB control number prior to adoption and publication of the final rules. *See* 5 C.F.R. Section 1320.13(f). The final rules need only be submitted to OMB if they have been "substantively or materially" modified after approval by OMB as proposed rules. *See* 5 C.F.R. Section 1320.13(g).[6]

6. The Commission's proposed financial rule, as set out in the *Third Notice of Proposed Rule Making*, CC Docket No. 85-388, 3 FCC Rcd 2591 (1988), was submitted to OMB and approved prior to adoption of the final rule. Under the proposed rule, applicants relying on internal financing were required to submit "in conformance with generally accepted accounting principles" a balance sheet current within ninety days of the date of the application. The Commission's final rule, as adopted in the *Fourth Report and Order*, CC Docket No. 85-388, 4 FCC Rcd 2542 (1988), was inadvertently not submitted to OMB at that time. Under the final rule, applicants relying on internal financing are required to submit (1) audited financial statements certified within one year of the date of the application, indicating sufficient net current assets to construct and operate the proposed cellular system, (2) a balance sheet current within sixty days of the date of filing showing the continued availability of the required funds, and (3) a certification by the applicant attesting to the validity of the unaudited balance sheet. *See* Section 22.917(c)(6) of the Commission's rules.

7. The Committee argues that the information collection requirements in the final rule are not "substantively or materially" different from those in the proposed rule. The Committee contends that the proposed rule required applicants to submit financial statements "in accordance with generally accepted accounting principles," and that the final rule merely served to clarify and restrict this requirement. We disagree. Under the proposed rule, applicants could have demonstrated their financial qualifications by submitting a single balance sheet. Under the final rule, applicants must submit both a balance sheet and a separate "audited financial statement." The financial statement must include the auditor's certification, and the balance sheet must be current within sixty days rather than the originally proposed ninety days. We conclude that the final rule contains "substantive and material" changes in the information to be collected and thus requires OMB approval under the PRA. *See* 5 C.F.R. Sections 1320.13(g), 1320.11(h).[8]

8. The Committee also argues that, because the Commission's final rule has not been "affirmatively disapproved" by OMB, Radiophone should not be allowed a second chance to demonstrate its financial qualifications. The Committee contends that if a proposed rule is approved by OMB the final rule is automatically valid and enforcable unless OMB "affirmatively disapproves" it (1) within a specified sixty day period, and (2) based on a finding that the rule was substantially and materially modified after approval. In support of this argument, the Committee cites Section 3504(h) of the PRA, 44 U.S.C. Section 3504(h), and 5 C.F.R. Sections 1320.5, 1320.13(g).

9. We find that the Committee's argument is without merit. The "public protection" provision of the PRA provides that no penalty, such as dismissal, may be imposed for failure to comply with an unauthorized information collection requirement. *See* 44 U.S.C. Section 3512.[9] The information required by the Commission's final rule was never authorized by OMB, and thus no penalty can be imposed for failure to submit the information. Section 3504(h) of the PRA, which is cited by the Committee, merely states that nothing prevents OMB from disapproving an information collection requirement under various specified circumstances. *See* Section 3504(h)(5). Section 3504(h), however, does not indicate that OMB must affirmatively disapprove an information collection requirement as a condition precedent to application of the "public protection" provision of the PRA. Similarly, Section 1320.5 of OMB's regulations indicates that OMB may disapprove, or order modified, an unauthorized information collection requirement. *See* 1320.5(b)(1)-(2). However, even if OMB has not acted, agencies may not impose a penalty for failure to comply with an unauthorized information requirement, and "shall instead permit respondents to prove or satisfy the legal condition in any other reasonable manner." *See* Section 1320.5(b).[10] We therefore reject the Committee's argument and accept the additional financial showings filed by Dana and Radiophone.[11]

10. We conclude that the information collection requirements contained in Section 22.917(c)(6) of the Commission's rules were not approved by OMB prior to the date the applications were due to be filed at the Commission,[12] as required by the PRA, and that the captioned applications were improperly dismissed.[13] Accordingly, we reinstate the applications and accept the applicants' supplemental financial filings. Furthermore, we have reviewed the applications and the supplemental filings and find that the applicants are legally, technically and financially qualified to construct and operate the proposed cellular systems. We therefore grant the captioned applications.

IV. CONCLUSION

11. We conclude that Section 22.917(c)(6) of the Commission's rules was not approved in accordance with the requirements of the Paperwork Reduction Act, and that no penalty should be imposed for failure to submit the information required by that section. We therefore reinstate and grant the captioned applications.

V. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED that the applications of Dana Communications, Ltd., File No. 10614-CL-P-314-A-89, Radiophone Corporation, File No. 10216-CL-P-413-A-88 and Radiophone Corporation, File No. 10187-CL-P-712-A-88, ARE REINSTATED NUNC PRO TUNC AND GRANTED. This authorization does not include the right to any interference protection in any areas outside the Alabama 8 - Lee, Iowa 2 -Union and Wisconsin 5 - Pierce RSAs and is also conditioned upon Dana's and Radiophone's coordinating with current and future co-channel licensee(s) in the areas outside the Alabama 8 -Lee, Iowa 2 - Union and Wisconsin 5 - Pierce RSAs. The licensees herein are put on notice that in the event any current or future MSA/RSA licensee encounters interference from any 39 dbu extension(s), the licensee therein will have to change frequencies in those cell(s) or pull back their 39 dbu contour to eliminate the interference due to the extension.

13. IT IS FURTHER ORDERED that all other mutually exclusive applications in the Alabama 8 - Lee RSA, Iowa 2 - Union RSA and Wisconsin 5 - Pierce RSA ARE HEREBY DISMISSED.

14. IT IS FURTHER ORDERED that the Hearing Designation Order in CC Docket No. 91-142, Algreg Cellular Engineering, et al., IS VACATED to the extent that it designated for hearing the application of 21st Century Cellular in the Iowa 2 - Union RSA.[14]

15. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Dana Communications, Ltd. and Radiophone Corporation ARE GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Dana Communications, Ltd.*, 6 FCC Rcd 5382 (1991); *Applications for Review and Petitions for Reconsideration of the Return of Rural Service Area Cellular Applications for Having Defective Maps*, 6 FCC Rcd 5378 (1991).

[2] Dana relied on a financial commitment from its general partner and Radiophone on a commitment from its parent corporation. Petitioners' applications are thus subject to the internal financing provisions of Section 22.917(c)(6). *See* Section 22.917(c)(7) (applicant relying on financing obtained through parent corporation must submit information required by Section 22.917(c)(6) as it pertains to the parent corporation).

[3] *See* 44 U.S.C. Sections 3501-3520.

[4] Mr. Domencich filed competing applications in all 428 RSA markets. The Committee for a Fair Lottery, which is described as a voluntary association of RSA applicants, includes Mr. Domencich as a member. The opposition states that the Committee and its members would be adversely affected by reconsideration of the Commission's decision dismissing the Radiophone applications.

[5] The Committee also opposed Radiophone's request for a one week extension of time in which to respond to an MSD request for additional information. We grant that extension request.

[6] *See also* 5 C.F.R. Section 1320.11(h).

[7] *See Third Notice of Proposed Rule Making*, 3 FCC Rcd at 2591. *See also* Section 22.917(a)(3) (incorporated by reference into the proposed rule). Under the proposed rule, if the balance sheet did not show sufficient funds, applicants would be required to submit whatever additional information is necessary to demonstrate their financial ability. *Id.*

[8] *See* Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13666, 13683 (Mar. 31, 1983) ("minor adjustments in wording" allowed without resubmission to OMB, but "if the substance of the collection of information is changed, or if the change is in any way material" OMB clearance required). *See also Asset Management Corp.*, _____FCC Rcd_____ (Mob. Serv. Div. 1991) (final rule regarding internal financing by RSA cellular applicants is substantially and materially different than proposed rule).

[9] Section 3512 states that "[n]otwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not display a current control number assigned by the Director [of OMB], or fails to state that such request is not subject to this chapter." Although the Commission's final rule displays a control number, we conclude that this is not a valid "current control number" because the number was assigned to the proposed rule and not to the modified final rule.

[10] The Committee also cites 5 C.F.R. Section 1320.13(g) in support of its argument. The sixty day period for OMB action provided in Section 1320.13(g) applies only if the final rule was submitted to OMB. *See* Section 1320.13(g).

[11] Dana filed a supplement to its financial showing on May 24, 1990. Radiophone supplemented its financial showing on December 11, 1991, in response to an MSD request for additional information.

[12] In 1990 all Part 22 rules were resubmitted to OMB. On March 14, 1990, OMB approved all of the Part 22 rules, including Section 22.917(c)(6), as part of the triennial renewal of OMB approval.

[13] We note that the Radiophone applications were dismissed for failure to comply with either the "bank" letter requirements of Section 22.917(c)(5), or the internal financing provisions of Section 22.917(c)(6). *See Return of Rural Service Area Applications*, 6 FCC Rcd at 5378-79. However, we do not need to address the arguments made by the parties regarding Section 22.917(c)(5). Because the Radiophone firm financial commitment is properly evaluated pursuant to Section 22.917(c)(6), see note 2, *supra*, our finding that Section 22.917(c)(6) should not be enforced is determinative, and the Radiophone applications must be reinstated.

[14] The application of 21st Century Cellular, File No. 10344-CL-P-413-A-88, is a mutually exclusive application for the Iowa 2 - Union RSA, and is thus dismissed by this order. However, we note that 21st Century Cellular was selected as the tentative selectee in a subsequent lottery and its application was designated for hearing in CC Docket No. 91-142. In light of our dismissal of 21st Century Cellular's application, we are vacating that part of the Bureau's Hearing Designation Order in CC Docket No. 91-142 that designated 21st Century Cellular's application for hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

USA MOBILE	File Nos. 23914-CD-P/ML-01-89
COMMUNICATIONS,	23915-CD-P/ML-01-89
INC. II	24690-CD-P/ML-01-90

For facilities in the Public Land
Mobile Service on Frequency 158.10 MHz
at Walton and Florence, Kentucky
for station KNKC338, and on
Frequency 931.5125 MHz at Walton,
Kentucky for station KNKL685

SANDRA E. LANTER File No. 29532-CD-P/L-01-89

For facilities in the Public Land
Mobile Service on Frequency
158.10 MHz at Williamstown, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1992; Released: March 9, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On August 2, 1990, Mike Lanter[1] (Lanter) filed a letter requesting cancellation of a lottery scheduled for the captioned mutually exclusive applications for frequency 158.10 MHz at Walton, Florence and Williamstown, Kentucky. The lottery was held, and USA Mobile Communications, Inc. II (USA Mobile) was named tentative selectee.[2] Lanter contends that USA Mobile should have been excluded from the lottery because its 158.10 MHz applications were amended by a subsequently filed 900 MHz application. For the reasons discussed below, we dismiss the captioned USA Mobile applications, and grant the Lanter application.

II. BACKGROUND

2. On February 28, 1989, USA Mobile filed its applications for frequency 158.10 MHz at Walton and Florence, Kentucky.[3] Lanter timely filed its application for frequency 158.10 MHz at Williamstown, Kentucky on May 30, 1989.[4] The applications were found to be mutually exclusive.[5] They were scheduled to be in a lottery on September 12, 1990.[6] On May 9, 1990, USA Mobile filed an application for frequency 931.5125 MHz, also at Walton, Kentucky.[7] On August 2, 1990, Lanter filed a letter arguing that, under Section 22.525(e) of the rules, the lottery should be cancelled because the 900 MHz filing amended and superseded the USA Mobile 158.10 MHz applications. USA Mobile then requested dismissal of its 900 MHz application, in order to ensure that its 158.10 MHz applications would remain unimpaired and in the lottery.[8] Lanter contends that USA Mobile's 900 MHz application superseded its 158.10 MHz applications and rendered them void, leaving USA Mobile nothing to reinstate by withdrawing its 900 MHz application. The lottery for the captioned 158.10 MHz applications was held on September 12, 1990. USA Mobile was ranked first. *Supra* note 2.

III. DISCUSSION

3. Section 22.525(e) of the rules provides that:

> [a]n applicant filing an application for a 900 MHz paging frequency at a location within forty miles of a pending one-way application, without dismissing the previously filed pending application, will be treated as amending the previous application. The amended application will be considered newly filed and subject to the applicable cut-off procedures. . . . *Id.*

Section 22.525 embodies the Commission policy that limits paging applicants to "one frequency at a time." *Paging Systems--DPLMRS*, 89 F.C.C.2d 1337, 1353 (1982); *One-Way Paging Stations*, 92 F.C.C.2d 631, 637 (1982). In those decisions, the Commission held that, if an applicant files for a one-way paging frequency when it has another paging application pending in the same market, the previously filed application will be treated as having been amended by the subsequent application. The amended application is then considered newly filed and subject to the notice and cutoff rules of Sections 22.27 and 22.31.[9]

4. USA Mobile argues that its subsequent withdrawal of its 900 MHz application restored its 158.10 MHz applications in the same way that withdrawal of a defective amendment cures an application. We disagree. The original 158.10 MHz applications were superseded by the later 900 MHz filing on May 9, 1990, the filing date of the 900 MHz application. This amended the earlier filed 158.10 MHz applications which had proposed sites in the same service area. *Commonwealth Telephone Company*, 4 FCC Rcd 7830 (1989); *ATS Mobile Telephone*, 2 FCC Rcd 3183 (1987); *Lehigh Valley Mobile Telephone Company*, 2 FCC Rcd 88 (1987). When USA Mobile requested withdrawal of its 900 MHz application, it revoked the sole application it had left pending in the captioned market.[10] We find, therefore, that USA Mobile did not have an application for frequency 158.10 MHz that was mutually exclusive with Lanter's application, and the lottery was, consequently, unnecessary.

IV. CONCLUSION

5. For the reasons discussed above, we conclude that Lanter is legally, technically, and otherwise qualified to construct and operate the proposed facilities, and we further find that a grant of its application will serve the public interest, convenience and necessity.

V. ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED THAT the Application of Sandra E. Lanter for file number 29532-CD-P/L-01-89 IS GRANTED.

7. IT IS FURTHER ORDERED THAT the applications of USA Mobile Communications, Inc. II for file numbers 23914-CD-P/ML-01-89; 23915-CD-P/ML-01-89; and 24690-CD-P/ML-01-90 ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The death of Mike Lanter on February 24, 1991 resulted in the involuntary transfer of ownership of the Lanter 158.10 MHz application to his surviving widow and executrix of his estate, Sandra E. Lanter. 47 C.F.R. Section 22.23(c)(4).

[2] Public Notice, Mimeo No. 4822 (released September 14, 1990).

[3] Public Notice, Report No. PMS-89-27 (released April 5, 1989), listed the USA Mobile 158.10 MHz applications as acceptable for filing.

[4] On September 22, 1989, USA Mobile requested a comparative hearing in lieu of a lottery, arguing that the proposed facilities were needed for the expansion of its wide area coverage in Ohio, Kentucky and Indiana. *USA Mobile Communications, Inc. II*, DA-90-690, (released May 11, 1990). The Mobile Services Division (MSD) denied the request because USA Mobile had not demonstrated any existing subscriber demand for expanded service, as required by Section 22.31(c)(1) of the rules. *Id.*

[5] Public Notice, Report No. PMS-89-47, Mimeo No. 4136 (released Aug. 23, 1989).

[6] Lottery Notice, Mimeo No. 4065 (released July 20, 1990).

[7] Public Notice, Report No. PMS-90-36 (released June 6, 1990), announced the 900 MHz application as acceptable for filing.

[8] Letter from Jenifer E. Urff, Counsel for USA Mobile, to Donna R. Searcy, Secretary, Federal Communications Commission (received Aug. 20, 1990).

[9] The relevant portions of the sections provide that an amendment proposing a change in frequency shall be considered a major amendment, and the application shall be considered newly filed, subject to the 60-day cutoff period. 47 C.F.R. Section 22.23(c)(1); 22.23(g); 22.31(b).

[10] Even if we agreed that USA Mobile's withdrawal effectively reinstated its 158.10 MHz applications, the applications would not have been reinstated until August 20, 1990, more than 60 days after the April 5, 1989 public notice date of Lanter's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-71

In re Applications of

WILLIAM E. FITTS	File No. BPH-890913MJ
PATRICIA A. KORN	File No. BPH-890914MR
SOTO, INC.	File No. BPH-890914NL

For Construction Permit for a
New FM Station on Channel 228C
in Laughlin, Nevada

APPEARANCES

Robert L. Olender, Lee J. Peltzman and *Alan E. Aronowitz* on behalf of William E. Fitts; *Jerrold Miller* and *John Neely* on behalf of Patricia A. Korn; *Margot Polivy* and *Katrina Renouf* on behalf of Soto, Inc.; and *James Shook* on behalf of Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: March 4, 1992; Released: March 11, 1992

1. Fourteen mutually-exclusive applicants started out. *See* 56 F.R. 14373 published April 9, 1991.[1] Three remain: William E. Fitts (Fitts), Patricia Korn (Korn), and Soto, Inc. (Soto). The three seek authority to operate a new FM station on Channel 228C (93.5 MHz) in Laughlin, Nevada.

2. After the interlocutory pleading cycle had run its course, we only had to take evidence on one factual issue, the standard comparative issue. So the only two issues that need to be resolved are the standard comparative issue and the ultimate issue:

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. In addition, and under standard comparative issue, the Chief, Audio Services Division called for comparative engineering coverage.

4. We had a prehearing conference on July 8, 1991, an evidentiary, admission session on July 22, 1991, and hearings on August 5 and 6, 1991. Fitts, Korn, Soto, and the Mass Media Bureau[2] filed Proposed Findings of Fact and Conclusions of Law on September 23, 1991. The three applicants filed their Reply Findings on October 15, 1991.

Issue 1: The Standard Comparative Issue

Description of the Applicants

5. *William E. Fitts*. Fitts has applied as an individual applicant. *Patricia Korn* has ostensibly applied as an individual applicant. *Soto Inc.*, a Nevada corporation, has two stockholders and two classes of common stock. Steven M. Zozaya III is Soto's President and a director. He owns 900 shares of voting and 100 shares of nonvoting stock. His grandmother, Julia S. Zozaya is Soto's Secretary and a director. She owns 100 shares of voting and 8900 shares of nonvoting stock. So Steven Zozaya has 90% of Soto's voting power, but his grandmother owns 90% of the corporation.

6. Soto has 25,000 authorized shares of common stock, 10,000 voting shares and 15,000 non-voting shares. So with Steve Zozaya's 900 and Julia Zozaya's 100 voting shares, this leaves 9000 unissued voting shares. With Steve Zozaya's 100 and Julia Zozaya's 8900 non-voting shares this leaves 6,000 unissued non-voting shares.

7. Soto avers that the 9,000 shares of unissued voting stock and the 6,000 shares of unissued nonvoting stock are not being held for potential outside investors. The other 6,000 shares of unissued non-voting stock exist so that Steven Zozaya can buy a larger share in the station without having to buy out his grandmother.

Diversification of Mass Media

8. *William Fitts* has no broadcast or other media interests. Neither *Patricia Korn* (nor her husband)[3] have any ownership interest in or formal connection with any medium of mass communication. Neither *Soto* nor either of its two shareholders have any cognizable media interests.[4]

Best Practicable Service
Comparative Coverage

9. *William Fitts* would serve 59,116 people over a 25,205 sq. Km. area; *Patricia Korn* would serve 57,681 people over 16,545 sq. Km.; and *Soto* would serve 59,220 people over 25,263 sq. Km.

10. Both daytime, and nighttime, more than five full-time aural services are available in all areas proposed to be served by the Laughlin applicants.

11. Considering that the areas and populations of all three applicants are already well-served and there is only a maximum 2.7% population difference (1,539 people), no applicant merits a preference vis-a-vis any other applicant for comparative coverage.

Quantitative and Qualitative Integration

12. *William Fitts* claims 100% quantitative integration. He intends to serve as General Manager of his Laughlin station, and to work on a full-time basis (at least 40 hours a week) in that capacity. As the station's sole owner-manager Fitts will manage and supervise all aspects of the station's day-to-day operations. He will hire and fire employees; he will set personnel policies; he will establish and implement public affairs and other programming, sales and promotion, community relations, production, finances and general administration.

13. William F. Fitts was born in Washington, D.C. on August 15, 1941, and graduated from Old Dominion College in Norfolk, Virginia, in June 1965. He currently *resides* in Saratoga, California. But if his application is granted Fitts intends to move to a location within the proposed station's city-grade signal where he already owns property.

14. Fitts has *broadcast experience*. He started in 1959 at WAVY Radio and Television, Portsmouth, Virginia. He worked there from 1959-1962 as a prop builder, cameraman, and tape operator. He also did commercials and ran the film chain room. From 1962-1966, he was the television director for remotes, commercials, and sports events at WVEC-TV, Norfolk, Virginia.

15. In 1966 Fitts was drafted. He served with the U.S. Army at Fort Manmouth, New Jersey, from 1966-1968 as a radio and television production specialist. Between 1968 and 1972, Fitts was government sales manager with Memorex Corporation, Washington, D.C. Memorex manufacturers magnetic products for the broadcast industry. He was also employed part-time as a television director and producer at Logos. Logos produces commercials, remotes, and production programming material for television.

16. Currently Fitts is Vice President of Video Operations of CMC Technology (CMC). CMC, a division of Kodak Company, is located in Santa Clara, California. CMC manufactures broadcast quality video products. Fitts devotes about 45 to 50 hours a week to that job. But if his application is granted, Fitts will terminate his CMC employment so that he can honor his integration commitment.

17. Fitts lays no claim to *civic participation*. He will, however, install and maintain *auxiliary facilities* at the station's transmitter and studio.

18. William E. Fitts is a White, non-Hispanic male, so he's not entitled to any *minority* or *comparative enhancements*.

19. *Patricia A. Korn*. Based on her sole proprietorship Patricia Korn seeks 100% quantitative integration. However, she has failed to establish that her sole proprietorship is *bona fide*. In fact, Korn's opponents have established that her husband, Dennis Korn, has exercised a controlling influence over and involvement with the prosecution of her application,[5] especially in the area of finances.[6] Accordingly, she'll be credited with 0% quantitative integration.

20. The Korns have written eleven checks in connection with the Laughlin application. Ten of those checks were written out of the household checking account. Dennis Korn wrote six of them. The eleventh check, the filing fee for the application, was drawn on Dennis Korn's separate account, and written by him. Patricia Korn has no idea why Dennis Korn paid the filing fee for the application out of his separate account. But she says that she repaid him by a check written on their joint account. But the repayment check was not produced on discovery; she doesn't recall when she wrote it; and she doesn't even know when she had it in her possession.

21. However, Mrs. Korn admits that she was advised that checks sent to the Commission should be in her own name and not her husband's, but that advice was not heeded.

22. Patricia Korn also says that she knows she repaid her husband for the filing fee because she gave him a promissory note. She produced the promissory note which was drawn upon advice of counsel in an effort to create evidence that Mrs. Korn was acting separately. But the *bona fides* of the note is highly suspect.

23. Neither Patricia nor Dennis Korn remembers how the note was repaid. Patricia Korn doesn't even remember any of the basic facts about the note, such as amount owed; what the funds were used for, in what form she received the proceeds, or when it was repaid. Moreover, the note is dated some five days before the filing fee check (para. 20 *supra)* to which it is allegedly related.

24. It also appears that Dennis Korn will be contributing financially to the construction and initial operation of his wife's proposed station. Aside from the loan (findings 22-23 *supra)*, Patricia Korn specifies as sources of funds a line of credit and a savings account. She holds both of these sources jointly with Mr. Korn.

25. Patricia Korn's application was filed on September 14, 1989. But it was Dennis Korn who sent the application to Jerrold Miller, Korn's communications attorney, for filing. It was Dennis Korn who wrote the letter that accompanied the application. Patricia Korn wasn't present when the letter was prepared, the wording is Mr. Korn's.

26. In the accompanying letter Dennis Korn asks Miller to ". . . note on the two FCC Forms *I* have enclosed that *I* have made the following changes since your last review . . ." A little later Mr. Korn says "*I* have a confirmation letter of the availability of this antenna." Then Mr. Korn says "*We* have also received and *reviewed* the engineering report made by Ben Evans. . ."

27. At the hearing Mrs. Korn was asked about the "changes" that her husband had referred to in his letter. She couldn't recall what changes were made, either before or after she was shown the application to refresh her recollection.

28. A short time later, on October 5, 1989, Dennis Korn wrote another letter to Mr. Miller. In his letter he referred to both his wife's Laughlin application and a sister's (Esther Korn's) Desert Hot Springs Station. He claims he wrote the letter to Miller because his wife and sister had asked him to do so.

29. In the October 5, 1989 letter, Dennis Korn asked Miller to "please send *us* a list of the applications for the Laughlin station." He also stated "*I* am anxious to determine the number of applicants and which applicants you feel will be Patricia's biggest competition." After Mr. Miller received this letter, Jerrold Miller was concerned enough about Dennis Korn's participation that he told Patricia Korn that Mr. Korn could not be "in the loop."

30. On this point, Patricia Korn *ostensibly* submitted an attorney-client privilege claim for some 20 documents. *See* FCC 91M-1757 released May 30, 1991. But Mrs. Korn can't recall discussing an attorney-client privilege claim with Miller for the October 5, 1989 letter (FCC 91M-1757 *supra*, Item 4). In fact, Mrs. Korn can't recall any of the details underlying her attorney-client privilege claim.

31. There is other evidence of Mr. Korn's direct involvement in his wife's application. For example, there is a page of handwritten notes that Mr. and Mrs. Korn prepared after her application was filed. One of the notes refers to a telephone call Mr. Korn made to Mrs. Korn's tower site locators with a billing inquiry.

32. Probably the most disconcerting thing in analyzing the *bona fides* of Patricia Korn's claimed sole proprietorship are the numerous inconsistencies and direct contradictions contained in both Mr. and Mrs. Korn's testimony. They have contradicted each other; they have contradicted themselves. Several examples of such contradictions will suffice.

33. Dennis Korn's initial thesis was that he did not want his wife to own a radio station or even be involved in obtaining one. In fact he repeatedly stated that after their first child was born he wanted Mrs. Korn to stay home and was opposed to her working. (Tr. 182, 187, 196, 208-209, 213, 239, 243). He says that when his wife started the process of applying for the Laughlin station, he tried to talk her out of applying and discouraged her from going forward with prosecuting it (Tr. 243-244).[7] He said that he had a fight with his wife when she told him about the application because he didn't want her to go forward with it. (Tr. 259).

34. On the other hand, Patricia Korn says Mr. Korn has never been opposed to her owning her own business or really opposed to her working. She says that he never tried to talk her out of applying for the Laughlin station; that he never tried to discourage her; and that he never tried to persuade her to drop the application. She says, that on the contrary, on occasions Mr. Korn has been rather enthusiastic about her Laughlin application (Tr. 330, 355, 357-358).

35. When Dennis Korn was asked if he would move to Laughlin if Mrs. Korn's application were granted, he answered "no way" (Tr. 183). On the other hand Mrs. Korn says that no decision has been made about whether Mr. Korn will move, and that he hasn't made a decision one way or another. (Tr. 355-356).

36. Mr. Korn assumes that if his wife's application is granted she would sell their current home in Los Angeles, and that to sell or not is her decision. But, says Mr. Korn, they haven't discussed the matter. Mrs. Korn says that they have discussed the matter, and she would not sell the house, because she and Mr. Korn have agreed that they would never sell the house. (Tr. 185, 356-357).

37. When Dennis Korn was asked if his wife had arranged to get funding from his employer, J.J. Eller, he said she had, "|B|ut keep in mind she's the one who got me my job with Eller. I'm not the one who introduced her to Eller" (Tr. 260, 287). Patricia Korn says she had nothing to do with Dennis Korn getting the Eller job.

38. Patricia Korn initially said that the only assistance she asked from her husband was in adding numbers (Tr. 354). Later she admitted that her husband discussed and explained each budget item to her (Tr. 440). At another point she said that her husband "only" advised her on the aspect of financing and helped her prepare her application (Tr. 363-364). At still another point she admitted that her husband had spoken to his sister (Debra Carrigan) about "salaries and things like that" as well as the costs to construct a station.

39. Dennis Korn said that he wasn't involved in preparing the proposed station budget other than to add numbers provided by his wife. He said that his total involvement in the preparation of her application ". . . couldn't have taken more than 5 or 10 minutes . . ." But see Findings 20-31 *supra*. When Dennis Korn was confronted with this wife's deposition testimony to the contrary, and the documentary exhibits evidencing more involvement than he'd care to admit, he testified that he could not recall such activities on his part or that they were undertaken at his wife's request (Tr. 177, 238-240, 243, 246-247, 256, 257, 262-263, 265, 279).

40. Patricia Korn claims 100% quantitative integration. She says she'll serve as the General Manager of her Laughlin station, working a minimum of 40 hours a week. She says that she'll set all station policies, hire and fire personnel, and assure compliance with all federal and local laws and regulations. She further states that she'll directly supervise all employees and will have final authority over the station's day-to-day operation. She claims she'll resign from her current or future employment before the station begins broadcast operations to meet her commitment to work full-time at the radio station.

41. Patricia Korn was born in 1955. She currently *resides* in Conoga Park, California, but proposes to move to Laughlin if her application is granted.

42. Ms. Korn is *a teacher by profession*. She has a bachelor of science from Whitman College in Walla Walla, Washington where she majored in psychology and education. She holds a clear (lifetime) credential from this college for kindergarten through twelfth grade. Ms. Korn also holds a clear credential from St. Lukes, Exeter College in England.

43. She holds a master of science degree in special education from Pepperdine University. She also holds a clear credential for special education through junior college from Pepperdine University. For many years her goal was to become a teacher of special students.

44. Ms. Korn is currently employed as a learning handicap specialist. She teaches handicapped, high-functioning autistic students in kindergarten through first grade at the Lockhurst Drive School in the Los Angeles Unified School District. She has been teaching for 12 years. She has earned tenure, and cannot be terminated except for cause.

45. Since she has never resided in the Laughlin area she cannot lay claim to *civic participation*, and she does not claim *broadcast experience*. However, she does propose *auxiliary* generating equipment at the studio and the transmitter.

46. Patricia Korn is a *Black female*, and lays claim to the qualitative comparative enhancements due a Black female.

47. *Soto, Inc.* Soto claims 90% quantitative integration. They stake their claim on the full-time integration of Stephen Zozaya's 90% voting control (900 shares of voting stock). Steve Zozaya also owns 100 shares of non-voting stock. All in all he owns 10% of the corporation.

48. Soto's 90% quantitative integration will be rejected. They have failed to support a quantitative claim in that amount. The record demonstrates that Steven Zozaya's grandmother, Julia Zozaya, has been the driving force behind Soto's application. Although she only owns 10% of the voting stock (100 shares), she owns 8900 shares of non-voting stock. So she owns 90% of the corporation. Julia Zozaya is an experienced broadcaster.

49. It was Julia Zozaya who first learned that the Laughlin channel was available. It was through Julia Zozaya that Stephen Zozaya found about the channel. Julia Zozaya has been heavily involved in the formation of the applicant. She helped decide the applicants form and structure. The lawyer used to incorporate Soto, Inc.,

and draw up the legal papers was Julia Zozaya's lawyer. Her engineer prepared the application. Even the name of the applicant was her idea.

50. It is Julia Zozaya that has put virtually all the money into the applicant. Stephen Zozaya has made nothing more than a token financial contribution, and even that token contribution has not been timely.

51. On September 14, 1989, at the time Soto filed their application, Stephen Zozaya hadn't purchased any of his stock in the corporation, i.e, neither his 900 shares of voting nor his 100 shares of non-voting stock. It wasn't until some 20 months later (May or June of 1991), that he paid for 500 shares of voting stock. And he didn't pay for the remainder of his stock until about 4 days before the hearing began in August of 1991.

52. Soto Inc.'s address is Julia Zozaya's office address. Soto's legal and engineering bills are sent to Julia Zozaya by name at that address. Not only has Julia Zozaya's involvement greatly exceeded that implied by her 10% voting interest and Soto's integration proposal, but such excessiveness promises to continue. Julia Zozaya has 100 shares of voting stock so that Stephen Zozaya can use her experience and knowledge, experience prosecuting radio applications and knowledge of how to manage broadcast stations. And Stephen Zozaya does intend to rely on his Grandmother if Soto gets the grant.

53. Julia Zozaya is providing the $450,000 in funding on which Soto is relying. She has provided a letter that spells out the terms of her proposed funding. Stephen Zozaya did not negotiate these terms with his grandmother. Even though Julia Zozaya is the only source of funding, the Zozayas are supposed to contribute to the station in proportion to their ownership. But Julia Zozaya has contributed more than her 90% equity interest.

54. Steve Zozaya is supposed to repay his grandmother anything she contributes above her 90% equity interest. But there are no documents recording that arrangement. It's an understanding between them. Stephen Zozaya believes that any money owed to Julia Zozaya is his personal debt. But the debt is a non-interest debt, and one which does not require him to provide security.

55. Based on the foregoing findings (Findings 48-54 *supra)* Soto, Inc. will only be awarded only 10% quantitative integration, an amount consistent with Stephen Zozaya's 10% equity in the corporation. Soto, Inc. has failed to demonstrate that Julia Zozaya's involvement will be limited to and consistent with her 10% voting interest. Conversely, Soto has also failed to demonstrate that Stephen Zozaya will exercise a control of the station that is consistent with his 90% voting interest. The record facts show otherwise.

56. Soto bases their 90% quantitative claim on the premise that Stephen Zozaya will be integrated full time as manager of the proposed station; i.e., at least 40 hours a week. He will supervise the station's day-to-day operation, administer and implement the station's Equal Opportunity Program, and hire and supervise all the staff.

57. Stephen Zozaya was born in 1964. He currently *lives* at 4540 West Osborne Road, Phoenix, Arizona, a residence he rents from his grandparents. His previous residence at 4540 West Osborne Road in Phoenix is also owned by his grandparents. He *proposes to move* to Laughlin if Soto is granted the license.

58. Mr. Zozaya left high school in 1980 but received a high school equivalency degree in 1982.

59. Steve Zozaya claims *broadcast experience*. From July 1982 until June 1991 he worked part-time in the evening as an on-call technical support assistant for Brentlinger Broadcast Engineering. Brentlinger installs and maintains broadcast facilities (Tr. 742). Since June 1991 he was worked full-time with Brentlinger. From around October 1982 until March 1985 he served as an Administrative Assistant to his grandmother at her broadcast facility, Station KNNN, Phoenix. Before March 1985 he also worked in Data Control, Engineering, Promotions and Production. Between March 1989 and April 1990, Mr. Zozaya worked at Station KOOL in Phoenix as an AM board operator. Steve Zozaya has never held a management position at a radio station.

60. Since he has never resided in the Laughlin area Stephen Zozaya cannot lay claim to *civic participation*. But Soto is committed to provide an *auxiliary power source* for their proposed station.

61. Stephen Zozaya is a *White Hispanic male* and claims the qualitative comparative enhancement due a White Hispanic male.

Conclusions of Law

The Standard Comparative Issue

1. Three applicants remain in the running for Channel 228C (93.5MHz) in Laughlin, Nevada. They are: (1) sole proprietor William E. Fitts, Jr.; (2) claimed sole proprietor Patricia Korn; and (3) Soto, Inc., a two-tiered, two-person corporation. We have held our hearing, and the parties have submitted their evidence under the standard comparative issue.

2. We will examine all three applications under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 as modified by subsequent Review Board and Commission decisions.

3. Under the *Policy Statement* we will address the Commission's two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of Mass Communications Media; and (2) selecting the applicant that will offer the best practicable service to the public.

Diversification of Mass Media

4. *William Fitts* has no broadcast or other media interests. Neither *Patricia Korn* (nor her husband) have any ownership interest in or formal connection with any medium of mass communication. Neither *Soto* nor either of its two shareholders have any cognizable media interests. So the Commission's first primary objective will have no bearing on the outcome of this comparative analysis.

The Best Practicable Service

5. We turn then to the Commission's second primary objective. In deciding which applicant will offer the best practicable service, we may have to examine all four basic criterion: (1) We will decide whether any applicant should be preferred because of the superior area and populations their proposal will serve (comparative coverage); (2) We will look at the extent each will integrate

their ownership into the day-to-day management of the station (Quantitative integration); (3) we may have to evaluate the attributes that each integrated owner will bring to that day-to-day management (Qualitative integration); and (4) we may have to consider the extent to which quantitative and qualitative integration is enhanced by minority and/or female status.

6. If it becomes necessary to reach the third criterion; i.e., qualitative integration, we will examine into such factors as local residence, participation in civic affairs, past education, and business experience, past broadcast experience, and auxiliary power.

7. *Criterion 1*: *Comparative Coverage*: None of the three applicants warrants a comparative coverage credit (*See* Findings 9-11 *supra*). There is no significant difference in the overall areas and populations each proposes to serve, and there is no underserved areas involved.

8. *Criterion 2*: *Quantitative Integration*: William E. Fitts and Patricia Korn each claim 100% quantitative integration, and Soto, Inc., based on Stephen Zozaya's 90% voting control and 10% equity, claims 90% quantitative integration. Fitts has sustained his 100% claim. No reason exists to doubt the *bona fides* of his claimed sole proprietorship (Findings 12-18 *supra*). So he'll be awarded 100% quantitative integration.

9. On the other hand Patricia Korn has failed to sustain her 100% quantitative claim. She has failed to demonstrate that her sole proprietorship is *bona fide*. Her husband, Dennis Korn, has exercised a controlling influence over and involvement with her application (Findings 19-39 *supra*). In fact he became so deeply involved, that Jerrold Miller, Korn's communication attorney submitted a letter that Dennis Korn had written him as part of an attorney-client privilege claim. *See* Findings 29-30.

10. Another reason Patricia Korn couldn't sustain the *bona fides* of her claim is the numerous inconsistencies and direct contradictions contained in both her and her husband's testimony on the subject. Dennis Korn and Patricia Korn not only contradicted each other, they contradicted themselves.[8] Accordingly she'll be credited with 0% quantitative integration credit.

11. Similarly, Stephen Zozaya has failed to sustain Soto's 90% integration claim. The Laughlin application is not his project in any sense of the word. His grandmother, Julia Zozaya, is the driving force and guiding force behind Soto's application. She has put up virtually all the money. Her local lawyer incorporated Soto, Inc. and drew up the corporate papers. Her engineer prepared the application. Even the name of the applicant was her idea. (Findings 48-51 *supra*.)

12. Soto, Inc.'s address is July Zozaya's office address. Soto's legal and engineering bills are sent to Julia Zozaya, by name at that address. (Findings 51-54.) Moreover, the qualitative attributes that Stephen Zozaya brings to the Soto application inspires little confidence that he'll be able to manage the Laughlin FM operation. Findings 57-60 *supra*. Accordingly, Stephen Zozaya will be given 10% quantitative integration credit; i.e., an amount consistent with his 10% equity position in the corporation.

13. Thus the quantitative integration factor proves decisional Fitts is entitled to 100% quantitative integration; Soto, Inc. is entitled to 10%; and Patricia Korn is entitled to none at all. Fitts is declared the comparative choice. It is Fitts who will offer the best practicable service to the public in Laughlin, Nevada.

14. Since the quantitative integration criteria has proved decisional, there is no need to analyze and compare the qualitative attributes of the three applicants or their minority and/or female enhancements.[9] *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannot Point Broadcasting Co.*, 93 FCC 2d 643 (R. Bd 1983) at 649.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, Patricia A. Korn's application (BPH-890914MR), and Soto, Inc.'s application (BPH-890914NL) ARE DENIED; and William E. Fitts' application (BPH-890913MJ) IS GRANTED.[10]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] Eight of the fourteen were dismissed on May 2, 1991 (FCC 91M-1516): Laughlin Broadcasting, Limited Partnership; First Broadcasting, Inc.; Thomas M. Eells; Playa Del Sol Broadcasters; Tuna Communications, Inc.; John Brush, Mark McVey, Jeff Linder, Diane Lysiak; Nevada FM Broadcasters; and Radioactive Communications, Inc. The ninth, Desert Broadcasting, Inc. was dismissed on July 3, 1991 (FCC 91M-2054). The tenth applicant to dismiss was Mountain View Broadcasting Company on August 6, 1991 (FCC 91M-2422). The eleventh applicant, Southern Nevada Broadcasting, A Limited Partnership, dismissed on November 5, 1991 (FCC 91M-3211).

[2] As is their custom the Mass Media Bureau's findings only addressed the comparative engineering question. *See* Finding 3 *supra*.

[3] *See infra*.

[4] Julia Zozaya is currently an FM applicant for Flagstaff, Arizona (BPH-860703MI), and Paradise Valley (BPH-870910NH).

[5] Dennis Korn is the brother of Debra Carrigan, the successful integrated applicant referred to in *Susan M. Bechtel v. Federal Communications Commission*, U.S. Ct. of Appeals, D.C. Circuit, Case No. 91-1112, page 14. According to the Court of Appeals, Debra Carrigan, within 5 months after being granted an FM license, contracted to sell the station for over $4 million to a group broadcaster.

[6] Dennis Korn says that his only interest in his wife's application was to dissuade her from any involvement (Tr. 243). He swore (falsely as it turns out) that the application was his wife's sole responsibility, paid for out of her separate property bank account.

[7] Patricia Korn learned about the existence of the Laughlin frequency from her husband who told her that his sister, Debra Carrigan (Footnote 5 *supra*.) had told him it was available.

[8] Patricia Korn is a teacher by profession. She teaches special education, and has been teaching for 12 years. She presently teaches handicapped, high-functioning autistic students. She hasn't convinced the Trial Judge that she'll abandon her teaching career to operate an FM radio station in Laughlin, Nevada.

[9] Note however, that Criterion 3 *Qualitative Integration* findings and Criterion 4 *Minority and/or Female enhancement* findings have been made. *See* Findings 13-18, 41-46, and 57-61 supra. So if an appellate body disagrees with all or part of the quantitative integration analyses, no remand will be needed.

[10] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-248

In re Applications of

BETH KNIGHT	File No. BPH-880516MA
LUCINDA FELICIA PAULOS	File No. BPH-880518MB
BODEGA COMMUNICATIONS, INC.	File No. BPH-880519MD
JOHN A. CAROLLO, JR.	File No. BPH-880519MX
MANZANITA MEDIA, INC.	File No. BPH-880519NR

For Construction Permit for a New FM Station on Channel 229A in Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1992; Released: March 12, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. In this five party comparative case, Administrative Law Judge Richard L. Sippel (ALJ) dismissed the application of Beth Knight for failure of proof and on a failure to prosecute her application on the financial issues specified against her. *Memorandum Opinion and Order*, FCC 91M-3465, released December 19, 1991 (*Dismissal Order*). Knight appealed her dismissal on December 26, 1991, pursuant to 47 CFR 1.301(a)(1), and a joint opposition was filed on January 8, 1992, by two competing applicants. We affirm the ALJ's ruling for the reasons set out below.

BACKGROUND

2. By *Memorandum Opinion and Order*, FCC 91M-3072, released October 11, 1991, the ALJ added financial qualifications issues against Knight. Knight was ordered to produce relevant documents by November 15, 1991, and to complete discovery by December 9, 1991, so that if justified, the ALJ could issue a summary decision resolving the financial issue. The parties had previously agreed to proceed by summary decision in lieu of setting the issues for hearing, and to this end the ALJ directed Knight to file her motion for summary decision by January 7, 1992. Knight, however, filed a request for leave to appeal the ALJ's ruling adding the issues. After the ALJ denied Knight's request, *Memorandum Opinion and Order*, FCC 91M-3259, released November 12, 1991, Knight filed a Statement For The Record (on November 13, 1991), indicating that she would not attempt to meet the issue by presenting any evidence, because she had not budgeted for litigation of the financial issue and could not afford to go forward with evidence to meet her burden of proof. *Dismissal Order* at para. 3. Knight recognized that the issues would be resolved against her for failing to carry her burden of proof but sought to protect her rights by asserting in exceptions that the ALJ improperly added the issues.

3. Adverting to the absence of any record evidence on the added financial issues, the ALJ found (at para. 4):

> [U]nder the circumstances, the Presiding Judge has no alternative but to declare Beth Knight to have been financially unqualified when she filed her application and continuing to the present. Therefore, the application must be summarily dismissed. *See Aspen FM, Inc., et al.*, 6 FCC Rcd 1602, 1603 (Comm'n 1991) (when a financial qualification issue is added the applicant must adduce probative evidence to meet the burden of demonstrating that she possesses the qualifications to be a Commission licensee). *See also Marc A. Albert, et al.*, 6 FCC Rcd 13 (Review Bd 1991) (Review Bd. affirms trial judge's summary dismissal of applicant who was found to have failed to proffer anything of substance to demonstrate its financial qualifications when it was given an opportunity at the trial level to so demonstrate). Thus, as a matter of law, Beth Knight's application must be summarily dismissed for a failure of proof . . . .

He further found that Knight's failure to prosecute her application was a separate ground for the dismissal ruling. He noted that Knight was requested to produce documents under discovery by November 15, 1991, but failed to do so, without first seeking and obtaining a stay or similar relief. He reasoned:

> [T]he party applicant has chosen *sua sponte* not to further prosecute her application. Therefore, separate grounds for dismissal for an intentional failure to prosecute are present in this case. *See Carol Sue Bowman*, 6 FCC Rcd 10 (Review Bd. 1991), rev. den. 6 FCC Rcd 4723 (Comm'n 1991) (applicant's failure to proceed with discovery on its financial qualifications issues was sufficient to justify dismissal of the application). *See also Mark A. Perry*, 4 FCC Rcd 6500 (Review Bd. 1989) (strong case for dismissal when decision not to prosecute is made with applicant's knowledge).

Dismissal Order at para. 5. Finally, the ALJ explained in considerable detail (*id.*, paras. 7-9) how his *Dismissal Order* satisfied the factors set out by the Court in *Communi - Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1554 (D.C. Cir. 1988), observing particularly:

> There have been no justifications offered by Knight except that after putting the parties and the Judge to the tasks of meeting rounds of pleadings, hearing oral argument and addressing a request for an interlocutory appeal, Knight announces that she cannot afford to proceed further and that she will not offer any evidence on her burden of proof. The prejudice

> to the parties is evident from the expenses that the Movants have incurred in connection with briefing the issues that were added, in preparing a comprehensive document request that has not been honored, and then being deprived of going forward to litigate a possibly disqualifying issue against Knight on-the-merits in the time period prescribed by the Trial Judge. The refusal to meet discovery deadlines and a filing deadline of January 7, 1992, that was set by the Judge in open court without objection, and the loss of a contingent court date set for February 26, 1992, disrupts the Commission's administrative hearing process.

Dismissal Order at para. 7.

DISCUSSION

4. On appeal, Knight states: "It is Knight's position that, if the ALJ erred in adding the financial issues against her, she should not be deprived of her right to seek review of the ALJ's action adding the issues because of her inability to fund the costs of litigating the issues. Knight should not have to pay for the ALJ's mistake." (footnote omitted) Appeal at p.2. Knight's position was squarely rejected, however, by the Commission's holding in *Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5902 (1990) that: "Applicants do not have the prerogative of disobeying the ALJ's discovery orders merely because they believe that antecedent rulings were legally erroneous." There, as here, the applicant had argued that the dismissal of its application was improper because the discovery orders it refused to obey pertained to erroneously added financial and misrepresentation issues. The Commission held that alleged errors in the ALJ's decision to enlarge the hearing issues did not constitute a sufficient basis for refusing to obey a lawful order. *See also Carmel Broadcasting Limited Partnership*, 6 FCC 2d 4633 (Rev. Bd. 1991), *review denied*, FCC 92-65, released February 26, 1992.

5. On the facts before us, the ALJ did not abuse his discretion. Authority to act on motions to enlarge issues is, in the first instance, vested in the presiding ALJ, 47 CFR § 1.243(k). Such rulings are appealable only if permission is first obtained from the ALJ, 47 CFR § 1.301(b), unless there has been egregious error or flagrant abuse of discretion and the appealing party has met the burden of establishing that such has occurred. *See Communications Satellite, Corp.*, 32 FCC 2d 533 (1971). The burden:

> on the would-be appellant is heavy to ensure orderly procedure and prevent the continued delays that could occur if proceedings were halted every time a party was disatisfied with the ALJ's interlocutory ruling and sought Commission or Board intervention.

Jan - Di Broadcasting, Inc., 93 FCC 2d 890, 891 (Rev. Bd. 1983). Here, Knight's claim of ALJ error in adding the issues is predicated in the main on procedural arguments that the joint enlargement petition was untimely. As Knight's opponents correctly answer, the issue of Knight's basic financial qualifications is a question of probable decisional significance, and Knight has not shown how the ALJ committed egregious error or flagrantly abused his discretion by adding it. *Cf. generally Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991).

6. To keep "litigation costs to a minimum," the ALJ afforded Knight an opportunity to produce her relevant financial documents, participate in discovery, and, if justified by the record, seek summary judgement regarding her financial qualifications. Knight did not cooperate, not even to the limited extent of producing whatever relevant documents she had in her possession. Failure to comply with the ALJ's discovery and procedural schedule dates is sufficient grounds for immediate dismissal of Knight's application. *See Carmel Broadcasting, supra* ; *Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990); and *Scioto Broadcasters, supra*. And, although the ALJ could have elected to wait until the issuance of his Initial Decision before ruling on the financial issues, delay would not have served any useful purpose here, in light of Knight's declaration that she would not adduce any evidence under the issues. *See generally Thomas W. Lawhorne*, 7 FCC Rcd 13, 15 para. 14 (Rev. Bd. 1992).

7. ACCORDINGLY IT IS ORDERED THAT, the Appeal from Dismissal of Application, filed by Beth Knight on December 26, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY and NEW ENGLAND TELEPHONE COMPANY,
Defendants.

File No. E-90-183

File No. E-90-184

ORDER

Adopted: February 28, 1992; Released: March 12, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 25, 1991, the Enforcement Division, Common Carrier Bureau, issued an Order holding the captioned cases in abeyance pending further Commission consideration of certain issues remanded by the U.S. Court of Appeals for the District of Columbia Circuit.[1] *Order*, 6 FCC Rcd 645 (1991).

2. On October 15, 1991, the Commission adopted a decision acting upon the Court's remand. *Decision on Remand*, CC Docket No. 86-497, FCC 91-324 (released October 31, 1991) (*Rate Base Decision*). In light of the Commission's *Rate Base Decision* there is no further need to hold the captioned cases in abeyance. Accordingly, the pleading and discovery schedules will recommence upon release of this Order. Dates for filing pleadings should be calculated, based on the timetable provided in the rules, from the release date.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990).
[2] For example, in a proceeding where no answer has been filed, an answer would be due 30 days from release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Applications of

AMERICAN MOBILE SATELLITE CORPORATION — File No. 420-DSE-P/L-90

For Blanket License for
30,000 Mobile Earth Stations

ROCKWELL INTERNATIONAL CORPORATION — File No. 933-DSE-P/L-90

For Blanket License for
15,000 Mobile Earth Stations

GEOSTAR MESSAGING CORPORATION — File No. 2306-DSE-P/L-89

For Blanket License for
10,000 Mobile Earth Stations

In the 1530-1544 MHz (downlink)
and 1626.5-1645.5 (uplink) Bands

COMMUNICATIONS SATELLITE CORPORATION - WORLD SYSTEMS DIVISION — File No. I-T-C-90-038

For authority pursuant to Section 214 of the Communications Act of 1934, to establish and operate communications channels via the INMARSAT system using a MARISAT satellite and an earth station at Southbury, Connecticut (WB-36) for interim use by the authorized domestic mobile satellite service (MSS) carrier in its provision of domestic MSS services

ERRATUM

Released: March 12, 1992

By the Chief, Domestic Facilities Division:

This Erratum makes the following correction to *Memorandum Opinion and Order*, 7 FCC Rcd 942 (1992), issued in the above-captioned proceedings:

All references to **American Mobile Satellite Corporation** are changed to **AMSC Subsidiary Corporation.**

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration
Concerning Liability of
EZ Communications, Inc., Licensee
of Radio Station KYKY-FM,
St. Louis, Missouri

For Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1992; Released: March 12, 1992

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has under consideration a Petition for Reconsideration of a Forfeiture Order issued by the Commission's Mass Media Bureau (MMB), pursuant to delegated authority, finding that EZ Communications, Inc. (EZ), licensee of Station KYKY-FM, St. Louis, Missouri, violated the Commission's rule concerning the broadcast of telephone conversations warranting the imposition of a $2,000 forfeiture.

2. The Forfeiture Order was issued in response to a pleading which the Mass Media Bureau considered to be a "Petition for Reconsideration" of a Notice of Apparent Liability (NAL).[1] The NAL, in the amount of $2,000, was issued against EZ Communications, Inc., on May 14, 1990, for willful violation of Section 73.1206 of the Commission's Rules, which requires a licensee, prior to recording a telephone conversation for subsequent broadcast, to inform parties to the conversation of the licensee's intent to broadcast the conversation.[2]

3. The Commission's investigation arose out of a telephone call made to Lisa Abram by KYKY disc jockey Guy Phillips on January 26, 1990. During this telephone call Mr. Phillips identified himself as being affiliated with Station KYKY, but made no reference to the fact that the conversation with Ms. Abram was being taped for broadcast. Later that same day, Ms. Abram called the station to verify whether Mr. Phillips was actually affiliated with KYKY. Ms. Abram also indicated that although she was not sure if the conversation had been taped, she did not want it broadcast in any event. KYKY subsequently broadcast the conversation ostensibly because of a "mixup" in receiving Ms. Abram's request not to broadcast it. Based on Ms. Abram's complaint and KYKY's response to a letter of inquiry, the Mass Media Bureau, acting pursuant to delegated authority, issued a Notice of Apparent Liability to KYKY on May 17, 1990, for violating Section 73.1206 of the Commission's Rules. On June 1, 1990, KYKY sought "reconsideration" of the Notice of Apparent Liability, asserting that Ms. Abram was aware that the conversation was being taped and had consented to its being broadcast. In a *Memorandum Opinion and Order* released on July 31, 1990, the Bureau affirmed its prior finding that during the conversation itself Ms. Abram had *not* been made aware of KYKY's intent to broadcast the conversation and imposed a forfeiture liability of $2,000.

4. The Petition for Reconsideration and an audiotape of the telephone conversation in question supplied by the licensee attempt to demonstrate that KYKY had given the requisite notice of intent during the conversation. A review of the audiotape, however, leads to the opposite conclusion. At the beginning of the tape after Mr. Phillips dials the number, Ms. Abram answers the phone, stating "Hello," to which Mr. Phillips replies "Yes, Lisa." Ms. Abram responds "Yes," and Guy Phillips continues by stating, "How ya' doing? This is Guy Phillips over Y98 FM Radio."

5. This is the only time Mr. Phillips identifies himself. There is no indication that Mr. Phillips gave Ms. Abram explicit notice of the intended broadcast use of the conversation before recording it for broadcast or, for that matter, at any time during the conversation. Indeed, he recorded for broadcast, and broadcast, the entire conversation right from Ms. Abram's answering of the phone. This lack of notice to Ms. Abram clearly violates Section 73.1206 of the Commission's Rules. Even if the statement "This is Guy Phillips over Y98 FM Radio" could be viewed as constituting implicit notice, such notice is inadequate. We note in this regard that under Section 73.1206, a party's awareness of a station's intent to broadcast a telephone conversation is presumed *only* if the party is associated with the station or the party originates the call. Ms. Abram had no connection to the station and did not originate the call. In any event, any notice Mr. Phillips may have given was given too late since it occurred *after* Ms. Abram said "hello" and *after* Mr. Phillips had started recording the conversation for broadcast. Section 73.1206 of the Commission's Rules clearly requires that such notice be provided "[*b*]*efore* recording a telephone conversation for broadcast . . . ." (Emphasis added.)

6. Furthermore, contrary to KYKY's assertion in the Petition for Reconsideration that KYKY always obtains a party's consent prior to broadcasting a conversation, nothing on the tape or otherwise before us suggests that Ms. Abram consented to the recording or broadcast of her conversation. Indeed, the tape substantiates Ms. Abram's allegation that she had no knowledge of KYKY's intent to broadcast the conversation.

7. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed on November 9, 1990, and supplemented on November 16, 1990, by EZ Communications, Inc., licensee of Radio Station KYKY-FM, St. Louis, Missouri IS DENIED on both procedural and substantive grounds.

8. IT IS FURTHER ORDERED That EZ Communications, Inc., licensee of Radio Station KYKY-FM, St. Louis, Missouri, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of two thousand ($2,000) for willful violation of Section 73.1206 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Technically, KYKY's letter of June 1, 1990, was merely a response to the Notice of Apparent Liability pursuant to Section 1.80 of the Commission's Rules. Because KYKY used the word "reconsider" in that response, the Mass Media Bureau viewed the document as a "Petition for Reconsideration" and referred to it by that name in the *Memorandum Opinion and Order* issued on July 31, 1990. In light of this, the document filed by KYKY on November 9, 1990, and supplemented on November 16, 1990, is being viewed as a Petition for Reconsideration of the *Memorandum Opinion and Order* issued on July 31, 1990. Under Section 1.106(f) of the Commission's Rules, a Petition for Reconsideration must be filed within 30 days of the date of the public notice of the final Commission order for which reconsideration is being sought. Since KYKY filed this Petition for Reconsideration in November 1990, more than 30 days after the public notice of the *Memorandum Opinion and Order*, the Petition is not timely and is therefore procedurally defective on its face. This deficiency alone is sufficient grounds for denying the Petition. A review of the Petition on the merits, however, as discussed below, provides an independent ground for denying the Petition.

[2] Section 73.1206 reads:

> Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station . . . or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application of
Ogden Broadcasting of
South Carolina, Inc.
For Stations WGSN(AM)/WNMB-FM
North Myrtle Beach, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1992; Released: March 12, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it two petitions for reconsideration of the Memorandum Opinion and Order and Notice of Apparent Liability (*Order*) released March 16, 1990, *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990), as it pertains to Stations WGSN(AM)/WNMB-FM, North Myrtle Beach, South Carolina. Ogden Broadcasting of South Carolina, Inc. (Ogden), licensee of the stations, filed its petition for reconsideration on April 16, 1990, and the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People and the National Black Media Coalition (NAACP/NBMC) filed on April 17, 1990. In the *Order*, we concluded that the licensee's failure to comply with the Commission's affirmative action rules warranted reporting conditions for three years, a forfeiture of $10,000 and renewal for less than a full term. *See* 47 C.F.R. Sections 73.2080 (c)(2), (3) and (5). In its petition, the licensee requests that the Commission eliminate or substantially reduce the forfeiture and grant renewal of the license for a full term. In their petition, NAACP/NBMC request that the Commission hold a hearing concerning the licensee's renewal applications and then deny the applications. We find that there is no basis on which to change our March 16, 1990, *Order*.

II. BACKGROUND

2. On November 1, 1988, NAACP/NBMC filed a petition to deny the license renewal applications for WGSN(AM)/WNMB-FM. NAACP/NBMC argued that the licensee's Equal Employment Opportunity (EEO) program failed to include contacts with minority referral sources and that the licensee failed to practice affirmative action. In the *Order*, we denied the petition to deny and renewed the license with the sanctions listed above. In this regard, we found, *inter alia*, that the licensee recruited for only 11 of the 27 full-time jobs filled during the four-year period ending in May 1988. It received only two Black applicants for its openings and none of its recruitment sources specifically targeted minorities. In addition, we found in the *Order* that the licensee did not engage in self-assessment of its EEO efforts despite the virtual absence of minority referrals during the four years preceding the renewal filings. Further, insofar as self-assessment is concerned, we also found in the *Order* that only one minority was hired and that Black employment declined from two in the upper-level category in 1983, 1984 and 1985 to one in 1986 and none in 1987 or 1988. After the petition to deny was filed, the licensee filed a new EEO program which included proposed contacts with minority recruitment sources.

III. PLEADINGS

3. In support of its request for reconsideration, the licensee contends that its record of hiring minorities is consistent with the requirements of *Wards Cove Packing Company, Inc. v. Atonio*, 109 S.Ct. 2115 (1989) (*Wards Cove*) and that the FCC is bound by those requirements in this case. The licensee argues that *Wards Cove* requires the FCC to use an employment profile analysis comparing the racial composition of the licensee's workforce with the racial composition of those in the local labor force who are qualified for jobs at the licensee's stations. The licensee argues that the FCC was incorrect in comparing the licensee's minority workforce with the total minority labor force in Horry County, South Carolina. Furthermore, the licensee defines "qualified" minority under *Wards Cove* to be those in the local job market who are currently working in broadcasting. The licensee then asserts that 85 people in Horry County are in upper-level radio positions, two of whom are minorities. Considering this, the licensee asserts, there should be no surprise that it had trouble getting minority referrals in the last four years of its license term. According to the licensee, the *Order* is flawed because it ignores the above *Wards Cove* arguments and other points the licensee raised in response to the petition to deny. When the licensee's EEO record is analyzed in accordance with *Wards Cove*, the licensee asserts that the sanctions imposed in the *Order* are unjustified. Moreover, the licensee argues that the sanctions imposed are inconsistent with the Commission's actions regarding similar cases.[1] According to the licensee, the stations in the above-cited cases had similar records but received better treatment than it did.

4. In their petition for reconsideration, NAACP/NBMC assert that even though the licensee received 90 applications for 53 hiring opportunities, only one Black applicant applied for a job at the stations despite the licensee's claim of two Black applicants. Although the licensee claimed that it hired one minority between August 1, 1987, and August 1, 1988, NAACP/NBMC express serious doubts that such a person was hired. Referring to the employment of minorities in "significant positions" at the stations at the beginning of the license term, NAACP/NBMC state that they are troubled by the departure of the minorities. They also assert that there is uncertainty regarding the reasons why the minorities left the stations.

5. In response to the NAACP/NBMC petition, the licensee pointed out that the minorities employed at the beginning of the term left for better job opportunities. The licensee asserts that there were no suspicious reasons for any of the departures and that it explained this in its opposition to the petition to deny and its response to NAACP/NBMC's comments to the opposition. The li-

censee also stated that it had trouble recruiting minorities because there are very few minorities qualified for upper-level broadcasting jobs in Horry County and even fewer who are looking for jobs in broadcasting.

6. In their response to the licensee, NAACP/NBMC state that *Wards Cove* is not applicable to the FCC's EEO Rule because the Rule is broader in scope than Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C.A. Sections 2000e et seq., 2000e - 2(a). Even if *Wards Cove* does apply in this case, NAACP/NBMC assert that the licensee too narrowly defines the universe of minorities qualified for upper-level positions as being those already employed in such positions in Horry County. They state that it is unlikely that the licensee's only source of new upper-level employees would be upper-level employees of other Horry County radio stations. NAACP/NBMC also disputes the licensee's assertion that there are two minorities of 85 people employed in upper-level positions in Horry County stations, stating that there is no evidence supporting these figures. NAACP/NBMC state that to the extent the FCC may have ignored the licensee's pleadings in the license renewal it was harmless error because the pleadings were meritless. Finally, NAACP/NBMC state that the Notice of Apparent Liability was proper considering that it amounted to $4 per day. They assert that the cost to society of discrimination is far higher.

IV. DISCUSSION

7. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioners' last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c). Applying this standard, reconsideration of the *Order* is not appropriate as discussed below.

8. First, we will consider the licensee's arguments. Regarding the applicability of *Wards Cove* to this case we note initially that an argument essentially the same as the licensee's *Wards Cove* argument here was raised in petitions against the renewal applications for Stations WESC/WESC-FM. This argument was specifically rejected in the same *Order*, at note 4, which acted on the subject WGSN(AM)/WNMB-FM renewals. In particular, we stated in the *Order* that *Wards Cove* dealt specifically with Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e -2(a), not the FCC's EEO rules. *See Order*, at 1709 n.4. The Commission has reviewed the applicability of Title VII to our EEO responsibilities before and has found that our responsibilities in this area go beyond factors in Title VII that may serve as limits on anti-discrimination efforts. We pointed out in *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices-Memorandum Opinion and Order and Notice of Proposed Rule Making*, 13 FCC 2d 766, 767 (1968) (*NPRM*), that our EEO responsibilities flow not from Title VII but from the Communications Act, 47 U.S.C. Sections 307(a) and (d) and 309(a), which requires the Commission to grant broadcast license applications only after finding that the "public interest, convenience and necessity" would be served thereby. In adhering to this policy we uphold our determination in the original *Order* that *Wards Cove* does not limit our analysis of a licensee's efforts to attract minority applicants. *See also Application of WXBM-FM, Inc. for Renewal of License of Station WXBM-FM, Milton, Florida*, 6 FCC Rcd 4782, 4786 n.13 (1991).

9. Moreover, we reiterate that the licensee did not recruit for 16 of its 27 positions, did not engage in meaningful efforts for its remaining 11 positions, and failed to engage in any self-assessment and modification of its EEO program until after the filing of a petition to deny. To the extent the licensee seeks to argue that *Wards Cove* justifies such a lack of efforts because only two minorities are in upper-level radio positions in Horry County, its argument is legally unsupportable and reconsideration on such a basis is inappropriate.

10. The licensee next maintains that the Commission treated it more harshly than licensees in similar situations. We disagree. A comparative analysis of the cases cited by Ogden and the *Order* reveals that the EEO record of the licensee in the instant case is distinguishable from and more egregious than the other cases cited. In *WROV*, the licensee followed its EEO program to some extent, used minority oriented sources, received 14 minority referrals for 11 total openings in its renewal year when it hired one minority, and hired 10 Blacks of 65 hires (15.4%) in its license term. *Letter to Burton Levine, WROV Broadcasters*, 4 FCC Rcd 6157 (1989). In contrast, Ogden exhibited significantly less effort than the licensee in *WROV*. The records of *Eastern Carolina, Baltimore Radio*, and *KVII-TV* show more frequent minority recruitment and, as a result, more consistent employment of minorities in upper-level positions throughout their license terms. *Letter to Vassie G. Balkcum, Eastern Carolina Broadcasting Company, Inc.*, 4 FCC Rcd 1621 (1989); *Application of the Baltimore Radio Show, Inc. for Renewal of License of Station WFBR, Baltimore, MD*, 3 FCC Rcd 5913 (1988); *Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685 (1989) (KVII-TV, Amarillo, Texas). Finally, the situations in *Naples* and *Beasley* also differed from Ogden. These stations contacted minority recruitment sources more frequently than Ogden and were more successful in the hiring of minorities. *Letter to Allan W. Roberts, All Communications of Naples, Florida*, 4 FCC Rcd 3463 (1989) and *Letter to George G. Beasley, Beasley Broadcast Group*, 4 FCC Rcd 5214 (1989). Review of the sanctions imposed against Ogden leads us to conclude that they were appropriate in light of the licensee's record and case precedent.

11. Turning to the arguments in the NAACP/NBMC petition for reconsideration, we find that they, too, fail to justify any change in the *Order*. The Commission fully considered their allegations regarding the licensee's minority recruitment and hiring record and took them into account when it issued the *Order*. Regarding the minority whom the licensee reportedly hired in 1988, NAACP/NBMC offered no evidence to show that the licensee submitted an inaccurate EEO Program Report in 1988. Furthermore, in its responses to the petition to deny, the licensee described the minorities employed at the beginning of the license term and stated that each departed voluntarily for other job opportunities. NAACP/NBMC have presented no additional facts not already considered with respect to this issue.

V. CONCLUSION

12. Neither the licensee nor NAACP/NBMC present new evidence to support their contentions that the licensee's EEO record warrants sanctions other than those imposed in the *Order*. Further, they fail to show any material error or omission in the *Order*. In addition, we note the factors which the Commission takes into account when determining the amount of forfeiture penalty include the nature, circumstances, extent and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. 47 C.F.R. Section 1.80 (b)(3). After consideration of all these factors and taking into account the arguments put forth in the licensee's petition, as addressed above, we find that the original *Order* imposing a forfeiture of $10,000, short-term renewal, and reporting conditions is appropriate.

VI. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, that the petitions for reconsideration are DENIED, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503 (b), that Ogden Broadcasting of South Carolina, Inc. FORFEIT to the United States the sum of ten thousand dollars ($10,000) for the wilful and repeated violation of the Commission's affirmative action provisions. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504 (a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504 (a) as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *See Letter to Burton Levine, WROV Broadcasters*, 4 FCC Rcd 6157 (1989) *(WROV); Letter to Vassie G. Balkcum, Eastern Carolina Broadcasting Company, Inc.*, 4 FCC Rcd 1621 (1989) *(Eastern Carolina); Application of the Baltimore Radio Show, Inc. for Renewal of License of Station WFBR, Baltimore, MD*, 3 FCC Rcd 5913 (1988) *(Baltimore Radio); Letter to Allan W. Roberts, All Communications of Naples, Florida*, 4 FCC Rcd 3463 (1989) *(Naples); Letter to George G. Beasley, Beasley Broadcast Group*, 4 FCC Rcd 5214 (1989) *(Beasley); Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685 (1989) (KVII-TV, Amarillo, Texas) *(KVII-TV)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-342

In re Application of

PONTCHARTRAIN BROADCASTING COMPANY, INC. — File No. BPCT-870330KT

For Construction Permit for New UHF Television Station, Channel 62, Hammond, Louisiana

Appearances

Harry C. Martin, Esq., and *Andrew S. Kersting, Esq.*, on behalf of Pontchartrain Broadcasting Company, Inc.; and *Y. Paulette Laden, Esq.*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: February 13, 1992; Released: March 13, 1992

By the Review Board: BLUMENTHAL and ESBENSEN, MARINO (Chairman), Dubitante.[1]

Board Member ESBENSEN:

1. Before the Review Board is the *Supplemental Initial Decision*, 6 FCC Rcd 5025 (1991) (S.I.D.), of Administrative Law Judge Edward J. Kuhlmann (ALJ), as well as exceptions filed by the sole remaining applicant,[2] Pontchartrain Broadcasting Company, Inc. (PBCI or Pontchartrain), and the Commission's Mass Media Bureau (Bureau). Because of its now unexceptional nature, and with only one applicant remaining in this proceeding, this case occasions no need for additional oral argument before the Board. We have reviewed the S.I.D. in light of the hearing record and the exceptions, and conclude that the ALJ's denial of PBCI's application should be affirmed.

2. The ALJ originally issued his *Initial Decision*, 3 FCC Rcd 6800 (1988) (I.D.), in this proceeding in November 1988. On appeal to the Board, and after hearing oral argument in June 1989, we added financial issues against PBCI and remanded the proceeding to the ALJ. *See Memorandum Opinion and Order*, 4 FCC Rcd 5245 (Rev. Bd. 1989) (*Remand Order*). Thereafter, in response to a petition to enlarge issues, the ALJ added a real-party-in-interest issue against PBCI. *Memorandum Opinion and Order*, FCC 90M-64, released January 10, 1990. In the S.I.D., the ALJ adversely resolved the following issues against PBCI (S.I.D., para. 1):

> 1. To determine whether Pontchartrain Broadcasting Company, Inc. is financially qualified to be a Commission licensee.
>
> 2. To determine whether Pontchartrain Broadcasting Company, Inc. falsely certified its application with respect to its financial qualifications and the effect thereof on its qualifications to be a Commission licensee.
>
> 3. To determine whether Ronald Curet is a real-party-in-interest in the application of Pontchartrain Broadcasting Company, Inc. and, if so, whether Pontchartrain should be disqualified.

BACKGROUND

3. Our *Remand Order* observed that PBCI had originally intended to rely upon (1) certain funding from its shareholders (Milo Beaver, Keiko Niehaus, Willie Grant Jackson, Pauline Rovira Kron, and Ernest Marco Deiparine), who each promised to contribute $30,000, and (2) a $5,000,000 bank loan to construct and operate the facility. However, our *Remand Order* observed (3 FCC Rcd at 6801):

> Pontchartrain was organized by the Hammond law firm Curet & Curet. Ronald and Douglas Curet, lawyers in the firm, called four of the five stock subscribers to talk to them about applying for the station. Tr. 38, 40, 245, 313, 389. Mr. Beaver suggested Ms. Niehaus for the proposal and of the five subscribers they were the only ones who knew each other. Tr. 40, 249, 313, 394. Pontchartrain's principals stated that they were selected by the Curets because they were minority group members. Tr. 41-42, 247, 392. The Curets have assisted in preparing the application, the corporate documents, the financing (Tr. 186-88) but the applicant has never been charged for the law firm's services. Tr. 182. Keiko Niehaus, Pontchartrain's treasurer, did not know what the charge for the Curet's services would be, if any. Tr. 183. The Curet firm keeps the corporate minutes. Tr. 49. When Ms. Kron and Mr. Deiparine needed to borrow to contribute to the applicant, Ronald Curet co-signed their loans. Tr. 350, 407. Ms. Niehaus also took out a bank loan for $1,000 to meet her obligation. She said no one ever inquired about whether she could come up with $30,000. Tr. 189-90. Mr. Jackson and Mr. Deiparine also intend to borrow to make payment on their $30,000 obligations. Tr. 251, 391.
>
> The bank which will lend Pontchartrain the funds needed for the station was not known to the treasurer, Ms. Niehaus, who said hesitantly she thought it was Fourth Security in Slidell. Tr. 187, 188. Mr. Jackson said it was the St. Tammany Parish Bank in Mandeville. Tr. 265. Ms. Kron said it was the St. Tammany Bank. Tr. 342. Ms. Niehaus was vague about how Pontchartrain obtained a loan letter of $5 million. She said Mr. Beaver obtained the letter but she believed it was only with Mr. Curet's help. Tr. 187. Mr. Jackson could not recall when the letter was obtained or when he saw it. Tr. 264. Ms. Kron was definite that she had no involvement in obtaining financing. Tr. 342. Mr. Deiparine was uncertain about how the letter was obtained, what the bank was, and when it was obtained. Tr. 411-18.

We further noted that, at oral argument, (then) counsel for PBCI could not "recall" (1) whether the first "bank letter" purportedly issued to PBCI was obtained prior to, or after, the time PBCI filed its application (Tr. 668) (although Ms. Niehaus testified that the letter was obtained *after* PBCI filed its application, Tr. 215); (2) whether there were requirements for collateral or security contained in the "bank letter" or whether the principals (or PBCI) acceded to any such collateral or security requirements (Tr. 668-669); and, (3) if the "bank letter" exceeded the lending limits of the institution.

SUPPLEMENTAL INITIAL DECISION

4. *Financial Issues*: In his S.I.D., the ALJ found, in pertinent part, that (S.I.D., para. 4):

> Pontchartrain treasurer, Keiko Niehaus, explained that Pontchartrain is relying on its stock subscribers to provide $30,000 each. Tr. 174. Ms. Niehaus stated that she had subscribed to 600 shares for which she would have to loan Pontchartrain $24,000 and pay outright $6,000. Tr. 174, 175. At the time of the 1988 hearing, Ms. Niehaus had not purchased any of her shares. Tr. 176. She stated that each "member" had contributed $3,300. Tr. 176 . . . . She said that money to build the station would come from the sale of nonvoting stock. Tr. 179. When she was asked whether she had any current source for the money, she responded that she had "an idea that several people would buy if I tried to sell . . . ." Tr. 179. When she was asked again to be absolutely clear about how the proposal would be financed, she reiterated that the money would come from nonvoting shareholders but that there were none then. Tr. 184. Ms. Niehaus said she had been the treasurer since the application was filed. Tr. 184-85. Mr. Chase, counsel for Pontchartrain, then requested a recess. Ms. Niehaus returned to the witness chair. When she was asked how she would provide the $30,000, she interrupted and said she forgot to mention that the applicant had a $5 million bank loan. Tr. 186. She was nervous she said and had not thought of it. *Id.* The letter was obtained by Mr. Beaver, Ms. Niehaus initially claimed. Tr. 186-87. She then changed that answer and said that Ronald Curet called the bank and arranged for the loan. Tr. 188. That bank, she believed, was Fourth Security. *Id.* She said the bank was located in Slidell, Louisiana. Tr. 187.

5. The ALJ also recalled the initial hearing testimony of Willie Grant Jackson, PBCI's (then) first vice president (S.I.D., para. 7):

> Mr. Jackson also promised to provide $30,000 and, at the time of the hearing, he said he had provided $3,300. Tr. 251. He intended to meet his obligation from savings and a bank loan. Tr. 251. Only general discussions have been had, he said, about where he would obtain his share of the money. Tr. 252. Mr. Jackson said that none of the money he was going to provide would be used to construct or operate the station. Tr. 252. But the money he was going to provide would be needed to pursue the application. *Id.* No one ever asked him to establish that he could provide the money. Tr. 252, 253. Mr. Jackson, as did Ms. Niehaus, believed the company would issue nonvoting stock after a grant was made to raise money. Tr. 260. But when he was aked whether the money would be used to finance construction of the station, he said that it would not. *Id.* He was then asked why Pontchartrain wanted the additional money from stockholders; he stated that he was confused. *Id.* He said that he did not understand why there would be voting and nonvoting stockholders. Tr. 260-61. He said he could not remember why there would be nonvoting stockholders, although he had asked. Tr. 261-62. He asked the questions of Curet & Curet, not Mr. Beaver. Tr. 262. No one had indicated to Mr. Jackson that there were existing potential nonvoting shareholders. Tr. 263. Mr. Jackson said that the station would be financed with a bank loan and that the applicant had a letter from a bank. Mr. Jackson, with some prodding, said he first heard about the bank letter in 1988, sometime during the first three months of that year. Tr. 264. Mr. Jackson represented that he had seen the letter and it came from a bank in Mandeville, Louisiana, the St. Tammany Parish Bank. Tr. 265.

6. From the 1988 hearing, the ALJ also re-examined the testimony of Pauline Rovira Kron, a non-U.S. citizen (who had planned to work at the station), and found (S.I.D., para. 8):

> [Kron] had nothing to do with obtaining the [PBCI] bank letter. Tr. 342. But she said she had seen the letter. Tr. 343. She did not know whether the letter required that she put up collateral. *Id.* She said she did not have knowledge of the finances and when she was asked who in the group did, she said she did not know. Tr. 344-45. The only person in the group who had any experience with business, she believed, was Ernest M. Deiparine. Tr. 345. She remembered that she did not provide any financial information about herself to the bank. Tr. 348. It was her belief that the letter had been obtained about a year before the April 1988 hearing session. She believed Mr. Curet provided the bank with information. Tr. 349. She claimed that she had provided $3,300 to Pontchartrain, $2,000 of which she borrowed from Southeastern Bank. Tr. 349. The loan was arranged by Ronald Curet. Tr. 350. He cosigned for the loan. *Id.* Ms. Kron had no idea whether the other stock subscribers were rich or poor. Tr. 353. She explained that she would not obtain any stock certificates until she paid $6,000. Tr. 358-59. She, too, said Pontchartrain intended to sell stock to raise money. Tr. 361, 363. Ms. Kron agreed that Pontchartrain intended to obtain funds from a bank but she said that the money from the stockholders would be necessary because more would be needed. Tr. 365. She also indicated that if more money was not needed, the stockholder's money would reduce the need to rely on bank financing. *Id.* Ms. Kron had not, however, decided how she would obtain the money to pay for her shares. Tr. 371. She does not have the money now. *Id.*

7. Finally, the ALJ set forth his findings arising from the testimony of Ernest Marco Deiparine (proposed "business manager") (S.I.D., paras. 9-11):

> [Deiparine testified that] he did not know how much Pontchartrain estimated that it would cost to build and operate the station. Tr. 398. He represented that Pontchartrain could "for sure" borrow $5 million. *Id.* Mr. Deiparine borrowed $1,000 of the $2,300 he paid to Pontchartrain. Tr. 406. He could not remember the name of the bank he borrowed the money from. Tr. 406-07. He believes Mr. Curet cosigned the note for his loan. Tr. 407. He then said Mr. Curet had not but he was sure that Mr. Curet "recommended" he be given the loan. Tr. 407-08. Mr. Deiparine said he did not have any savings or checking account at a bank. Tr. 408. He receives social security and a "little pension." Tr. 408-09. He intends to borrow the remaining part of the $30,000 that he has promised to provide to Pontchartrain. Tr. 411. But he has not talked with any bank about lending him the remaining money. *Id.*
>
> First Mr. Deiparine said Mr. Chase obtained the bank letter, and then he said he did not know. Tr. 412. He then said the president of Pontchartrain, Milo Beaver, went to the bank to obtain the letter. Tr. 413. Mr. Deiparine assumes that Milo Beaver got the letter because he saw it. *Id.* However, Mr. Beaver did not tell Mr. Deiparine that he had obtained the letter. *Id.* In the end, Mr. Deiparine stated that he did not "know fully" who obtained the bank letter. Tr. 414. He could not remember which year he saw the letter from the bank for the first time. Tr. 414. At first he said it was 1988, and then 1987 or 1988. *Id.* He could not remember which bank had issued the letter. Tr. 415. While he said he had read the letter, he could not remember whether he would have to put up collateral for the loan. Tr. 415, 416. He did not know whether he would be required to guarantee the loan personally. Tr. 417. He did not talk with the bank, or provide any information about himself to the bank, and he did not know that Pontchartrain was going to obtain a bank letter until after it had been obtained. Tr. 417. He also did not know whether anyone spoke with other banks to obtain a letter for Pontchartrain. Tr. 418.
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> Mr. Deiparine said that there were two kinds of Pontchartrain stock, voting and nonvoting, but that there would not be nonvoting stockholders. Tr. 423, 424. Then he said there would be and that nonvoting stock would be sold in order to build the station. Tr. 424. The stock would have to be sold, he said, because the bank loan would not provide enough money. Tr. 424. Mr. Deiparine conceded he did not know how the proposal would be financed. Tr. 425. He could not remember to whom he gave the $2,300 he paid to Pontchartrain. Tr. 428. He claims to have paid it in cash. *Id.* He later said he took it to a bank. Tr. 429. But he concedes he had no deposit slip to put money in a Pontchartrain account. *Id* . . . . Mr. Deiparine also corrected his testimony and said he had contributed $3,300, instead of $2,300, as he said in answer to some questions. Tr. 436.

8. Nevertheless, the ALJ observed that PBCI had represented that, as of November 1, 1989 (and after this proceeding had been remanded), its voting stockholders had not met their requirement to contribute $30,000 each; indeed, the record reflects that four shareholders contributed only $2,300 each, and Beaver had contributed only $7,500. PBCI Exh. 19. In fact, PBCI stipulated that, on March 25, 1987, when it prepared and signed its application, *none* of its stock subscribers had reasonable assurance for a loan or sufficient liquid assets to meet their stock subscription agreements. PBCI Exh. 10; I.D., para. 12.

9. The ALJ also determined that, when a former competing applicant (Jenkins) noticed PBCI shareholders for deposition to explain how the applicant established its financial qualifications, PBCI had provided a document which claimed that Beaver *alone* made the determination that PBCI was financially qualified, without the assistance of any other stockholder. PBCI Opposition to Witness Notification, November 8, 1989. However, Beaver later denied that that was the case at hearing, Tr. 763-64, and he further averred that the other PBCI principals only "told him" they would be able to obtain the $30,000 they had promised to provide. Tr. 765; I.D., para. 13.

10. Ronald Curet, PBCI's "local counsel," also testified at the remand hearing concerning the purported "reasonable assurance" letter initially provided to PBCI. Curet said he had first discussed the issuance of such a letter with the President of Southeast National Bank, Richard Blouin. Curet is a director and member of the loan committee of that financial institution. Tr. 995, 999. The ALJ recounted that Blouin "was concerned" that a letter from Southeast to PBCI would be viewed as an "insider transaction" because of Curet's involvement in the applicant and his role at the bank; thus, Blouin suggested approaching the St. Tammany National Bank. Blouin called Brian Jakes, President of St. Tammany National Bank, described as a "friendly banker." Tr. 995. Curet then met with Jakes to explain "what our business was about" in an effort to obtain a letter. Tr. 996. However, Curet did not provide Jakes with any financial information about PBCI's proposal. Tr. 998. Curet also conceded that St. Tammany National Bank would require personal guarantees, and further admitted that he did not discuss collateral with Jakes. Tr. 1005. When Curet was asked why St. Tammany National Bank would make a loan to PBCI in light of the lack of information given to the bank, Curet could not provide a reason. Tr. 1003, and he stated that PBCI "only solves problems when faced with them." Curet also conceded that he did not even know how the applicant would structure itself at the time it applied for a loan. Tr. 1004; I.D., para. 15.

11. PBCI filed its application in this proceeding on March 30, 1987, containing its first affirmative financial certification. PBCI claims that Jakes had agreed to provide the "reasonable assurance" letter on March 18, 1987, but that Beaver did not go to the bank and pick up the letter until April 2, 1987. PBCI Exh. 11, at 2-3. Beaver said that when he went to the bank he found that the letter was dated April 2, 1987; however, he convinced Jakes to have the letter retyped and back-dated to March 18, 1987 (because that purportedly was the day Jakes agreed to provide the letter). *Id.* The ALJ found that "this explanation appears improbable since Mr. Beaver claimed he did not work during that period in order to be available to conduct Pontchartrain business and there was no

apparent reason why he would have waited two weeks to obtain the letter. Tr. 859, 870." I.D., para. 14. Apparently, Beaver was not busy.

12. The ALJ further found (I.D., paras. 18-21):

> The letter from the St. Tammany National Bank would not "hold up," Pontchartrain's [new] counsel told Mr. Curet after his October 25, 1989 [remand] deposition. Tr. 1007-09. Mr. Curet contacted Jack Blossman about getting another bank letter for Pontchartrain. Tr. 1007, 1008. Mr. Blossman is the president of Parish National Bank of St. Tammany. Tr. 1050-51. Mr. Curet did not provide Mr. Blossman with information about Pontchartrain's proposal or its shareholders. Tr. 1009, 1011, 1056. He did not explain to Blossman how the $5 million would be spent. Tr. 1010. They also did not discuss collateral, personal guarantees or pledges of stock. Tr. 1010. Mr. Blossman was not even provided with a list of Pontchartrain's stockholders. Tr. 1011. The only Pontchartrain principal ever identified to Mr. Blossman was Milo Beaver. Tr. 1056. And that was not done until they met at the hearing when Mr. Blossman testified. Tr. 1056.
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> Mr. Blossman wrote his letter for Pontchartrain the day Mr. Curet went to see him. Tr. 1052. Mr. Curet knows that Parish National Bank could not lend $5 million dollars without the assistance of other banks but he did not ask Mr. Blossman about how that would be done. Tr. 1011-13. The letter is the same as that which Pontchartrain received from the St. Tammany National Bank except that Parish National Bank does not guarantee that it can arrange to syndicate the loan. Tr. 1054-55. When they spoke, Mr. Blossman congratulated Mr. Curet on getting the license but Mr. Curet said there was a problem because St. Tammany National Bank had been closed by regulators and the applicant needed financing. Tr. 1054. Mr. Blossman said he assumed that the personal guarantees of Pontchartrain's principals would be required. Tr. 1055. Milo Beaver said, however, that he had not agreed to guarantee the loan. Tr. 793.
>
> Mr. Blossman does not consider the letter to Pontchartrain from his bank to provide a commitment. Tr. 1056. There has been no determination of how much equity Pontchartrain must provide to receive a $5 million loan. Tr. 1057. Ordinarily, when Parish National Bank provides a letter making an advance commitment, the borrower makes an actual loan application and the bank reviews the value of the property to be financed. Tr. 1058-59. This letter was outside the ordinary course of business conducted by the bank. Tr. 1057-58. The loan process for this large a loan would require a lengthy review and approval by the other banks that will participate in the loan. Tr. 1061. None of the factors that will influence the bank in making the loan were reviewed before Mr. Blossman wrote his letter to Pontchartrain. Tr. 1062. Mr. Blossman readily admitted that he did not know how many shareholders Pontchartrain has or its current financial position. Tr. 1067. The only document in the transaction between Pontchartrain and Parish National Bank is the letter from Mr. Blossman. Tr. 1068.
>
> Mr. Beaver stated in his written testimony that he had met with Mr. Blossman but he retracted those statements when he was examined at the hearing. Tr. 715-16. He conceded he had never spoken or corresponded with Blossman or sent him documents. Tr. 792. Other parts of Mr. Beaver's testimony were inaccurate, despite his review of it, and had to be changed. Tr. 707-17. Actually, Mr. Beaver conceded, all the arrangements with Parish National Bank were made by Mr. Curet. Tr. 792. Mr. Curet did not tell Mr. Beaver whether he would have to put up any of the money for the proposal in order to obtain the loan. Tr. 793-94.

13. In light of all the foregoing, the ALJ concluded that PBCI had not established that the two bank letters it relied upon were obtained through any deliberate process of assessment by any bank or PBCI. Also, PBCI "has five principals and when they were questioned during the hearing they did not know what the applicant's financial plan was, except in the most general way. Moreover, their testimony conflicts with the representations made in written exhibits prepared by counsel and their testimony is inconsistent with each other." I.D., para. 39.

14. In adversely resolving Issues (1) and (2) against PBCI, the ALJ ultimately held (I.D., paras. 46-47, 59):

> There is no question that Pontchartrain was never at any time financially qualified and that it is not qualified. It has not demonstrated that any principal of Pontchartrain did anything to determine the applicant's financial qualifications before it certified them. Pontchartrain claims that Mr. Beaver made the determination and he claims the other shareholders assisted him in making the determination. The record does not support those representations. Mr. Beaver said that Seymour Chase, then the applicant's counsel, provided him with cost estimates and a staffing proposal. But Mr. Beaver could not remember whether he received them before he certified. He also could not remember whether he had any say in their preparation or whether he made any changes. Mr. Beaver could not even say whether there was an equipment proposal before the letter was sought from Brian Jakes of St. Tammany National Bank. Without reading from testimony prepared by counsel, Mr. Beaver was unable to testify about Pontchartrain's estimates. Pontchartrain attempted to assert that Mr. Beaver helped obtain the letter from at least the St. Tammany National Bank. But the record reflects that Mr. Beaver did no more than pick up the letter on April 2, 1987, after he had certified on March 30, 1987. Mr. Beaver concedes that he and Mr. Jakes only discussed how interest rates fluctuate. Pontchartrain has not established that Mr. Curet arranged for the letter before Mr. Beaver certified. The testimony indicates that Mr. Curet asked Southeast National Bank and Richard Blouin of Southeast National Bank asked Brian Jakes at St. Tammany National Bank to issue the letter because Mr. Blouin was concerned that a letter to Pontchartrain from his bank would be viewed as an insider loan to Mr. Curet.
>
> There is no evidence that Mr. Beaver or any other principal of Pontchartrain, including Mr. Curet, made the necessary analysis to determine whether

> the applicant was financially qualified. The principals of Pontchartrain did not determine whether they could meet their own obligations to the applicant, whatever the purpose: whether it was to buy stock, pay prosecution expenses or build and operate the station. Each principal had his or her own view of why they were required to contribute money; it is evident they had no idea what the money was to be used for. It cannot be concluded that Pontchartrain could have certified in good faith. . . .
>
> * * *
>
> The record in this proceeding demonstrates that the Commission cannot rely on [PBCI's] representations. Mr. Beaver's testimony in this long proceeding has been inconsistent and in material respects, dishonest. [PBCI] is not qualified to become a Commission licensee.

DISCUSSION

15. PBCI now readily concedes that it "does not dispute the ALJ's finding that it was not financially qualified at the time it certified [affirmatively] to its financial qualifications, nor that it was not financially qualified prior to May 9, 1991." PBCI Exceptions at 3 n. 1. PBCI's sole argument before the Board in this regard is that it certified its financial qualifications "in good faith." Consequently, PBCI argues that the ALJ erred in finding that PBCI falsely certified its financial qualifications, and, therefore, that the ALJ erred in rejecting a May 1991 amendment of its "revised financial proposal." *Id.*, at 2. The Bureau, which did not participate in the hearing on the remanded financial issues (*see* I.D., n. 3), concurs with PBCI and claims that there "were no findings in the I.D. that PBC engaged in deliberate misrepresentation" and that the record demonstrates that there was an "absence of evidence of intent to deceive." Bureau Exceptions at i-ii. We must disagree.

16. PBCI, *inter alia*, takes issue with the ALJ's findings (I.D., at para. 21) that "Beaver stated in his written testimony that he had met with Mr. Blossman but he retracted those statements when he was examined at hearing. Tr. 715-16." PCBI Exceptions, Attachment A at 3. PBCI now merely claims that Beaver "explained" at hearing that although he had "appointments" to meet with Blossman, he was unable to keep those appointments, and that Beaver "affirmed these *corrections*" at hearing. *Id.* (emphasis added). However, in PBCI's direct written case (Exhibit 11), signed under penalty of perjury by Milo Beaver on November 1, 1989, Beaver specifically represented that, in order to induce the Parish National Bank to issue a "reasonable assurance" letter, "*I subsequently met with [the bank President, Blossman] and provided him information about PBC's application and the television market.*" It is patent that this written statement was false and misleading when made, and that Beaver knew this statement to be untrue. Indeed, the record reveals that Beaver only met Blossman for the first time at the hearing in Washington, D.C. I.D., para. 45. Nonetheless, this sworn declaration was submitted to the forum by PBCI. Additionally, while Beaver declared that (PBCI Exh. 11, p. 1): "I was aware of the requirements of the Federal Communications Commission that an applicant be financially qualified . . . .," he attempted, in essence, to declaim any responsibility for obtaining PBCI's initial worthless "bank letter" by arguing that he relied on PBCI's first communications counsel (Seymour M. Chase) as to financial requirements. *Id.* This does not wash. Moreover, subsequent to the release of our *Remand Order* (in which a full exposition of the Commission's "reasonable assurance" standards was set forth), and with PBCI represented by *new* communications counsel, a second equally worthless "bank letter" was nevertheless obtained by PBCI to demonstrate to the Commission that it was financially qualified. And, whereas PBCI attempted to rely upon this second letter from the Parish National Bank (contemplating a loan in the principal amount of $5,000,000), Beaver conceded (PBCI Exh. 11 at 5): "I understood that the lending limit of the Parish National Bank is between $1 million and $1,400,000.00." In this regard, we also note that Beaver apparently *changed* the amount of the bank's lending limit in the exhibit at the time he executed, under penalty of perjury. But he made no changes to the specific representation that he had met Blossman in person.

17. In our *Remand Order*, 4 FCC Rcd at 5248 n. 4, we indicated that a false certification issue was mandated, *inter alia*, because of substantial and material questions concerning the ability of the principals of PBCI to meet their specified loan commitments and the represenations made by PBCI. While PBCI now concedes that none of these shareholders had sufficient net liquid assets, nor reasonable assurance of any loans to meet their $30,000 stock subscription agreements, *see* para. 8, *supra*, Beaver knew (or had to know) this to be so when he affirmatively certified PBCI's application. Indeed, Beaver himself had made no more than $7,500 available to PBCI, and his claim that the other shareholders "assisted him" in making the determination that PBCI was initially financially qualified is simply not suported by the record. *See* I.D., para. 46. And, none of the PBCI principals had determined whether or not they could meet their corporate obligations; each had his or her own perception why they were required to contribute $30,000; but none of the shareholders had any idea what these sums were to be used for. As examined in some detail, *supra*, the shareholders' initial hearing testimony was obviously inconsistent and equivocal concerning their ability to meet their stock purchase/loan commitments. Thus, we agree with the ALJ that it cannot be concluded that PBCI certified in good faith. In the application of PBCI executed by Beaver, the instructions to FCC Form 301 set forth a succinct definition of the bases required for affirmative certification (FCC Form 301, Instructions, Section III):

> An applicant for a new station must certify that it has sufficient liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

These instructions also state that, although documentation supporting certification of financial qualifications "need not be submitted with this application [such documenta-

tion] must be available to the Commission upon request." *Id.* Additionally, the certifications required by Questions 1 and 2 in Section III, FCC Form 301 are equally specific:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (excluding bank, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

And, as the Board and the Commission have observed on numerous occasions, while the Commission did not require the filing of financial documentation at the time PBCI filed its application, it firmly expected appliants to have such information at hand at the time of certification. *Public Notice on Random Verification of Financial Certifications*, 2 FCC Rcd 2122 (1987); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *South Florida Broadcasting Co.*, 94 FCC 2d 452 (1983)("We are not, in any way, modifying the underlying substantive criteria . . . ."); *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981)(documentation supporting the attestation of financial qualifications need not be submitted with the application, but must be available to the Commission upon request). Nevertheless, and in spite of this clear and unequivocal language in FCC Form 301, Beaver affixed his original signature to the form, attesting to the truth and accuracy of the representations made therein (specifically including PBCI's financial qualifications) -- an act to which the Commission attaches significant import because "[t]he original signature requirement provides assurance that the applicant has *personally reviewed* the application and can be held responsible for the truthfulness and accuracy of the statements made therein." *Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991) (emphasis added); *see also B. J. Hart*, 20 RR 301 (1960).

18. With respect to PBCI's claim that, in essence, it relied upon its initial counsel's representations in believing that it was financially qualified (and, therefore, did not falsely certify its application), we again point out the well-founded principle that counsel is the applicant's agent when appearing before the Commission, and applicants are, therefore, bound by counsel's actions. *Carol Sue Bowman*, 6 FCC Rcd 4723 (1991); *see Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5193 (1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd 419, 420 n. 6 (1986). Additionally, the concatenation of facts and circumstances here leave no doubt that PBCI intended to, and did, attempt to deceive the Commission and the ALJ as to its financial qualifications; thus, it must be disqualified. As a result, the ALJ did not err in rejecting PBCI's May 9, 1991 latter attempt to establish its financial qualifications (via a "bank letter" obtained nearly two years after the record was closed on the remanded financial issues). In its *Policy Regarding Character Qualifications in Broadcast Licensing* (*Character Policy Statement*), 102 FCC 2d 1179 (1986), the Commission has made clear that:

> We believe it appropriate to give misrepresentation specific consideration in the context of this *Policy Statement*. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.
>
> * * *
>
> As we have stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

102 FCC 2d 1179, 1209-11. *See Mid- Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *aff'd*, 5 FCC Rcd 940 (1990), *recon. dismissed in part, denied in part*, 5 FCC Rcd 4596 (1990), *aff'd by judgment*, *Mid - Ohio Communications, Inc. v. FCC*, 947 F.2d 1565 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 415 (1991); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946). Moreover, "the fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258 (Rev. Bd. 1972), *rev. denied*, 39 FCC 2d 1099 (1973), *rev'd on other grounds sub nom. Lebanon Valley Radio, Inc.* v. FCC, 503 F.2d 196 (D.C. Cir. 1974).

19. Additionally, on the record before us, we discern no basis for disregarding the ALJ's credibility determinations with respect to PBCI's witnesses, and, in particular, to witness Beaver (who was found by the ALJ to be "dishonest." *See* I.D., para. 59). While we have, on infrequent occasion, overturned such findings, *see, e.g., Richardson Broadcasting Group*, 5 FCC Rcd 5285, 5287 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 6364 (1990), *recon. aff'd*, 5 FCC Rcd 6964 (1990), the Board is generally enjoined to defer to the credibility findings of an ALJ. *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), *recon. granted in part and denied in part and review granted in part and denied in part*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989) (table), and it does so regularly where the record evidence supports those findings. *See e.g., Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700-2703 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 570 (1991), *recon. denied*, 6 FCC Rcd 3310 (1991); *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1964 (Rev. Bd. 1990), *aff'd*, 5 FCC Rcd 7651 (1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); *Tri-State Broadcasting Co.*, Inc., 5 FCC Rcd 1156, 1169-1173 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3727 (Rev. Bd. 1990), *rev. denied*, 5 FCC Rcd 6232 (1990); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 927 (Rev. Bd. 1991); *Safe Broadcasting Corporation*, 6 FCC Rcd 6548, 6550 (Rev. Bd. 1991); *Imagists*, 6 FCC Rcd 7440, 7446 (Rev. Bd. 1991).

20. In its present posture before the Board, PBCI concedes that it was not financially qualified when it affirmatively so certified in its initial application, and remained unqualified throughout this proceeding (until, PBCI claims, it obtained and submitted a third "bank letter" on May 9, 1991). Because the ALJ did not err in rejecting this latter "bank letter" amendment, PBCI's own admissions render Issue 1 fatal to that applicant. And, as indicated herein, the Board affirms the ALJ's adverse resolution of Issue 2 with respect to PBCI. Accordingly, because PBCI has not demonstrated that it possesses the requisite qualifications to be a Commission licensee with respect to the remanded "financial issues," we need not reach the "real-party-in-interest" (Issue 3) exceptions of PBCI and the Bureau. In this regard, we recall that the Commission has placed an additional premium on expediting the resolution of comparative contests so as to speed the delivery of new services to the public. *Proposals to Reform the Commission's Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1990), *modified on recon.*, 6 FCC Rcd 3403 (1991). As the Commission has repeatedly stated, "[a]n agency, like a court, need not decide questions which are not relevant to its decision." *Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991) (quoting *DeepSouth Broadcasting Co. v. FCC*, 278 F.2d 266 (D.C. Cir. 1960)). This is true even with respect to basic qualifying issues. *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n. 2 (1991); *accord, Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377 (Rev. Bd. 1991); *see generally Marlin Broadcasting of Central Florida, Inc. v. FCC*, No. 90-1505, slip op. at 14-15 n. 8 (D.C. Cir. Jan. 7, 1992).

21. ACCORDINGLY, IT IS ORDERED, That the application of Pontchartrain Broadcasting Company, Inc. (File No. BPCT-870330KT) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The Board Chairman agrees that the Decision strictly applies the candor requirement. However, he notes that the Mass Media Bureau's Exceptions, at p. 6, indicate that the applicant's "lack of familiarity with the details of PBCI's financial plan . . . does not constitute deliberate misrepresentation" and that "intent cannot be inferred from the obvious absence of sophistication in PBCI's principals." The Bureau's position heightens the Board Chairman's concern that PBCI's principals were ill-served by their local counsel, and their first two communications' counsel, who apparently failed to educate their clients about the financial certification requirements, and then failed to insure complete candor during the preparation and prosecution of the application. *See WEBR v. FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969).

[2] The other party to this proceeding, Louis E. Jenkins, Jr. d/b/a Florida Parishes Television Ltd. (Jenkins), dismissed its application pursuant to a settlement agreement (wherein PBCI agreed to pay Jenkins $375,000, $125,000 of which is contingent upon grant of PBCI's application). *See Memorandum Opinion and Order*, FCC 90M-3584, released November 9, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-58

In the Matter of

Amendment of Section 73.202(b),	RM-7419
Table of Allotments	RM-7797
FM Broadcast Stations	RM-7798
(Caldwell, College Station	
and Gause, Texas)[1]	

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: February 27, 1992; Released: March 13, 1992

Comment Date: May 4, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 1551 (1991), proposing the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas, and the modification of the construction permit of Station KHEN, Channel 236A, Caldwell, Texas, to specify operation on Channel 236C2. Roy E. Henderson ("Henderson") and Hicks Broadcasting Corporation filed comments and reply comments. Hicks filed an "Erratum" to its reply comments. Henderson filed an Opposition to the Acceptance of Erratum, and Hicks filed a Reply to that Opposition. Val-Jo Communications, Inc. ("Val-Jo") filed a Request for Leave to Submit Late-Filed Comments and Counterproposal and Comments and Counterproposal. Henderson and Hicks filed Oppositions to the Request for Leave. Val-Jo filed a Reply to the Oppositions. Hicks filed a Petition for Leave to File Supplementary Comments and Supplementary Comments. Val-Jo filed an Opposition to the Petition for Leave. Hicks filed a Reply to that Opposition.

2. As stated in the *Notice*, the proposed Channel 236C2 upgrade at Caldwell requires a site restriction of 32.7 kilometers (20.3 miles) northeast. The maximum site restriction at which we can normally predict the required 70 dBu principal city coverage is 32.6 kilometers. Accordingly, Henderson, as permittee of Station KHEN, was requested to submit an engineering exhibit showing compliance with the principal city coverage requirement of Section 73.315(a) of the Commission's Rules. In response, Henderson referred to a 1989 engineering exhibit he submitted in connection with MM Docket No. 88-48, depicting compliance with Section 73.315(a) of the Rules. On the other hand, Hicks has submitted an engineering exhibit indicating that the 70 dBu contour will not encompass all of Caldwell. We have carefully reviewed both engineering exhibits. These engineering exhibits have included maps outlining the city boundaries of Caldwell and the pertinent 70 dBu contour. The boundary lines on these maps differ. Specifically, the map submitted by Hicks indicates that the boundary line of Caldwell extends a distance to the southwest approximately 0.4 miles greater than indicated on the map submitted by Henderson. This additional area is not encompassed by a 70 dBu contour. Accordingly, Roy E. Henderson and Hicks Broadcasting Corporation are requested to submit sufficient information to demonstrate the actual and current city boundary lines of Caldwell, Texas. This Request for Supplemental Information does not afford an opportunity to submit competing proposals.

3. Intersted parties may file comments on or before **May 4, 1992.** Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the following counsel:

Robert Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090

Herbert D. Miller, Jr.
Koteen and Naftalin
Suite 1000
1150 Connecticut
Avenue, N.W.
Washington, D.C. 20036

David D. Oxenford
Fisher, Wayland, Cooper
and Leader
Suite 800
1255 23rd Street, N.W.
Washington, D.C. 20037-1125

4. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504, and 73.606(b) of the Commission's Rules*, 46 FR 11549, published February 9, 1981.

5. For further information concerning this matter, contact Robert Hayne, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or the staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in this proceeding. Any reply comment which has not been

[1] The communities of College Station and Gause have been added to the caption.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-302

In the Matter of

Amendment of Section 73.202(b), RM-7826
Table of Allotments,
FM Broadcast Stations.
(Fountain, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 28, 1992; Released: March 13, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 6017 (1991), issued in response to a petition filed on behalf of Hubbard Broadcasting, Inc. ("Hubbard"), permittee of Station KBIQ(FM),[1] Channel 241A, Fountain, Colorado, proposing the substitution of Channel 241C3 for Channel 241A and modification of its permit to specify operation on the higher-powered channel. Hubbard and The Word In Music ("TWIM"), (collectively referred to as "petitioners"), the proposed assignee of Station KBIQ(FM),[2] filed joint supporting comments. No other comments were received.

2. Channel 241C3 can be allotted to Fountain, Colorado, at the presently authorized site for Station KBIQ(FM),[3] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[4]

3. We believe the public interest would be served by substituting Channel 241C3 for Channel 241A at Fountain, since it would provide an expanded coverage area FM service to the community. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the construction permit for Station KBIQ(FM) to specify operation on Channel 241C3 at Fountain, Colorado, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 27, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Fountain, Colorado	241C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Station KBIQ(FM) IS MODIFIED to specify operation on Channel 241C3 in lieu of Channel 241A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, the permittee of Station KBIQ(FM) is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Radio Station KKFM(FM), as follows: Citadel Associates Limited Partnership, 1015 Eastman Drive, Bigfork, MT 59911.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

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[1] The call letters for Station KBIQ(FM) were assigned effective January 17, 1992.

[2] The construction permit (BPH-891006MP) for Station KBIQ(FM) was assigned from Hubbard to The Word In Music, Inc. on February 5, 1992 (see File No. BAPH-911203HL).

[3] Coordinates at the site specified in the construction permit for Station KBIQ(FM) are 38-44-47 and 104-51-37.

[4] As stated in the *Notice*, we recognize that the requested allotment of Channel 241C3 at Fountain conflicts with the presently authorized operation of Station KKFM(FM), Channel 243C, Colorado Springs, Colorado, at coordinates 38-44-36 and 104-51-37, and therefore, is dependent upon Station KKFM(FM) relocating to Channel 251C pursuant to the directive contained in MM Docket No. 81-819. Consequently, the issuance of a license for Station KBIQ(FM) on Channel 241C3 may be withheld until Station KKFM(FM) is licensed on Channel 251C at Colorado Springs.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-45

In the Matter of

Amendment of Section 73.202(b), RM-7918
Table of Allotments,
FM Broadcast Stations.
(Fargo, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 2, 1992; Released: March 13, 1992

Comment Date: May 4, 1992
Reply Comment Date: May 19, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Northwestern College ("petitioner") requesting the substitution of Channel 250C for Channel 250C1 at Fargo, North Dakota, and the modification of Station KFNW-FM's license to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 250C for Channel 250C1 at Fargo, North Dakota, since it could enable Station KFNW-FM to expand its coverage area. As requested, we also propose to modify Station KFNW-FM's license to specify Channel 250C in lieu of its present allotment. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Fargo or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Channel 250C can be allotted to Fargo in compliance with the Commission's minimum distance separation requirements with a site restriction of 33.8 kilometers (21 miles) west to accommodate petitioner's desired transmitter site.[1] Canadian concurrence in the allotment is required since Fargo is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Fargo, North Dakota	229C, 250C1 270C, 300C	229C, 250C, 270C, 300C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 4, 1992,** and reply comments on or before **May 19, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John R. Wilner, Esq.
Bryan, Cave, McPheeters & McRoberts
700 Thirteenth Street, N.W., Suite 700
Washington, D.C. 20005-3960
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 250C at Fargo are North Latitude 47-00-37 and West Longitude 97-11-40.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-44

In the Matter of

Amendment of Section 73.202(b), RM-7914
Table of Allotments,
FM Broadcast Stations.
(Hattiesburg, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 2, 1992; Released: March 13, 1992

Comment Date: May 4, 1992
Reply Comment Date: May 19, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Community Broadcasting Company, Inc. ("petitioner"), requesting the allotment of Channel 269C3 to Hattiesburg, Mississippi, as that community's fourth FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application if the channel is allotted to Hattiesburg.

2. We believe petitioner's proposal warrants consideration. Channel 269C3 can be allotted to Hattiesburg, Mississippi, in compliance with the minimum distance separation requiremetns of the Commission's Rules provided there is a site restriction 8.4 kilometers (5.2 miles) east of the community.[1] The site restriction will prevent a short-spacing to Station WLMG, Channel 270C, New Orleans, Louisiana, and to vacant Channel 269C3 at Gluckstadt, Mississippi.[2] Channel 269C3 is short-spaced to Station WKNZ, Channel 269A, Collins, Mississippi. However, the license for Station WKNZ was modified in MM Docket No. 90-569 to specify operation on Channel 296A in lieu of Channel 269A. *See* 6 FCC Rcd 5545 (1991). The grant of a license for Channel 269C3, Hattiesburg, may be withheld until Station WKNZ, Collins, is licensed on Channel 296A.

3. We believe the public interest would be served by proposing the allocation of Channel 269C3 to Hattiesburg, Mississippi, since it could provide the community with its fourth local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hattiesburg, Mississippi	221A, 279C, 283C1	221A, 269C3, 279C, 283C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 4, 1992,** and reply comments on or before **May 19, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John S. Neely
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

6. IT IS FURTHER ORDERED, That the Secretary of the Commission, SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Southern Air Communications, Inc.
7501 Highway 49
Hattiesburg, Mississippi 39402

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such

[1] The coordinates for Channel 269C3 are 31-20-39 and 89-12-08.

[2] The license for Station WLIN, Channel 269A, Gluckstadt, was modified to specify operation on Channel 269C3 in MM Docket No. 90-569, effective November 14, 1991.

a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-46

In the Matter of

Amendment of Section 73.202(b), RM-7915
Table of Allotments,
FM Broadcast Stations.
(Cloquet, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 2, 1992; Released: March 13, 1992

Comment Date: May 4, 1992
Reply Comment Date: May 19, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by WKLK, Inc. ("petitioner"), requesting the substitution of Channel 243C3 for Channel 243A at Cloquet, Minnesota. Petitioner also requests modification of its construction permit (BPH-900315MI) for Station KOUV, Channel 243A, to specify opoeration on Channel 243C3.[1] Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 243C3 can be allotted to Cloquet, Minnesota, consistent with the Commission's spacing requirements, at petitioner's specified site 3.8 kilometers (2.3 miles) east of the community.[2] Canadian concurrence will be requested for this allotment since Cloquet is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We shall also propose to modify the construction permit for Station KOUV, Channel 243A, to specify operation on Channel 243C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the allocation of Channel 243C3 to Cloquet, Minnesota, since it could provide the community with an additional wide coverage area FM station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cloquet, Minnesota	243A, 263C1	243C3, 263C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 4, 1992,** and reply comments on or before **May 19, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel as follows:

Anne Thomas Paxson
Borsari & Paxson
2033 M Street, N.W., Suite 630
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] WKLK, Inc. has a request pending to change the call letters of Station KOUV to WKLK-FM.
[2] The coordinates for Channel 243C3 are 46-43-20 and 92-25-15.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-47

In the Matter of

Amendment of Section 73.606(b), RM-7929
Table of Allotments,
TV Broadcast Stations.
(Bellingham and Anacortes, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 5, 1992; Released: March 13, 1992

Comment Date: May 4, 1992
Reply Comment Date: May 19, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Prism Broadcasting Company, Inc. ("petitioner"), permittee of Station KBCB(TV), requesting the reallotment of vacant UHF television Channel 24 in lieu of Channel 64 at Bellingham, Washington, the modification of Station KBCB(TV)'s construction permit accordingly, and the substitution of vacant Channel 64 in lieu of Channel 24 at Anacortes, Washington, to accommodate the substitution at Bellingham. Petitioner does not state its intention to apply for the Bellingham channel, if allotted, and must do so in comments responsive to this *Notice*.

2. In support of its proposal, petitioner notes that because of the proximity of Station KBCB(TV) to vacant Channel 63, Vancouver, British Columbia, Canadian officials have indicated opposition to the operation of Station KBCB(TV) at more than 1,000 kilowatts ERP in the direction of Canada. Petitioner claims that operation of Station KBCB(TV) on Channel 24 in lieu of Channel 64 may permit operation of both Station KBCB(TV) and Channel 63, Vancouver, at increased power without special limits negotiated by international treaties.

3. A staff engineering analysis of the proposal has determined that UHF television Channel 24 can be allotted to Bellingham and Channel 64 to Anacortes in compliance with the Commission's minimum distance separation requirements.[1] The substitution of Channel 64 at Anacortes would move that channel 23.5 kilometers (14.6 miles) closer to Seattle, Washington, and 22.0 kilometers (13.7) miles closer to Tacoma, Washington. Although the Commission has imposed a freeze on television allotments in certain metropolitan areas, which includes the Seattle-Tacoma area, the Anacortes substitution is not affected by the freeze, as no additional channel is proposed.[2]

4. We believe the public interest would be served by proposing the reallotment of Channel 24 from Anacortes to Bellingham and the reallotment of Channel 64 from Bellingham to Anacortes, as it may permit Station KBCB(TV) to operate at increased power. As requested, we also propose to modify petitioner's construction permit for Station KBCB(TV) to specify operation on Channel 24 at Bellingham. We will not accept competing expressions of interest in the use of television Channel 24 at Bellingham. In addition, since Anacortes and Bellingham are located within 400 kilometers (250 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

5. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Anacortes, Washington	24	64
Bellingham, Washington	12+, *34, 64	12+, *34, 24

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **May 4, 1992,** and reply comments on or before **May 19, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Garry Spire, Esq.
Suite 104
23642 Calabasas Road
Calabasas, California 91302
(Counsel for Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of*

[1] The coordinates for Channel 24 at Bellingham are North Latitude 48-40-48 and West Longitude 122-50-23. The coordinates for Channel 64 at Anacortes are North Latitude 48-30-06 and West Longitude 122-36-36.

[2] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346, July 29, 1987.

the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 9, 1992

Released: March 13, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Corpus Christi	8310-HTS
Media Partners, L.P.	C12-422
Licensee, Radio Station	C10-100
KRYS(AM) & KRYS-FM	
702 McBride Lane	
Corpus Christi, TX 78408	

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture of six thousand eight hundred and seventy-five dollars ($6,875) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. The Notice of Apparent Liability is issued for your violations of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules.

BACKGROUND

On October 3, 1990, the Commission received a complaint alleging that Radio Stations KRYS(AM) and KRYS-FM aired announcements on behalf of Shipley's Donuts for two schemes which may have constituted lotteries in violation of Section 73.1211 of the Commission's Rules. On November 28, 1990, the Commission sent you a letter of inquiry requesting information about such announcements. On December 17, 1990, you submitted a response to our inquiry in which you acknowledge that you had broadcast these announcements, but contend that the schemes that these announcements described were not lotteries. We find that one scheme was a lottery and consequently, you are in apparent violation of Section 73.1211 of the Commission's Rules.

In your response, you acknowledge that the station aired advertisements for the two schemes. You state that, to the best of your recollection, the promotions began on September 24, 1990, and ended on October 12, 1990. One scheme provided that individuals who stopped by Shipley's Donuts and registered had a chance to win a bicycle. Because consideration was not involved in this promotion, we have determined that it was not a lottery. The other scheme provided that individuals who received a red star on their Shipley Donut receipts could instantly win paraphernalia, such as coffee mugs, book covers, pencils, pens, caps, neon T-shirts or satin jackets.

You contend in your Response that the advertisements did not describe schemes that constituted lotteries. You explain that no purchase was necessary to participate and therefore, no consideration was present. In fact, you explain, on September 27, 1990, the words "no purchase necessary" were added to the advertisement. Thus, you contend that because no purchase was necessary, there was no consideration and, therefore, no lottery.

DISCUSSION

The elements of a lottery are chance, prize and consideration. You admit that "prize" and "chance" were present. The element of consideration is the only element in dispute.

Consideration is present when an individual pays money or exchanges an item of value for the chance to win a prize. The mere act of appearing, registering and securing free gifts is not consideration in the lottery context. *Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions*, ("*Public Notice*") 18 FCC 2d 52 (1969) (*citing, Federal Communications Commission v. American Broadcasting Company, Inc.*, 347 U.S. 284 (1954)).

The description of the scheme in the announcement in question indicated that individuals could win paraphernalia if a red star appeared on their receipt. Because a receipt is usually given after an item has been purchased for money - an item of value has been given up - the element of consideration was present.

Our conclusion is not affected by your argument that: 1) although not stated in the text of the announcements for the first couple of days it aired, no purchase was necessary to obtain a receipt to participate and, 2) the later aired spots contained the notice "no purchase necessary."

For the first two or three days the advertisements aired, irrespective of whether a purchase was necessary to participate in the scheme, individuals had no notice that they could participate without making a purchase or how they could do so. Consequently, they were at a disadvantage *vis a vis* purchasers. This was not altered by the addition to the ads of the words "no purchase necessary" on September 27, 1990.

When relying on "equal availability" to non-purchasers to eliminate the lottery element of consideration, the availability of chances must be real and the actual number of chances given to non-purchasers must be approximately equal to those chances given to purchasers. In order to assure such equal availability, announcements for the promotion must provide detailed information such as, the locations, times and manner in which the free chances can be obtained. *See Public Notice*, 18 FCC 2d 52 (1969); *Taft Broadcasting Co.*, 18 FCC 2d 186 (1969). The Commission has stated that "no purchase necessary" or "nothing to buy" does not communicate this message. *Public Notice*, 18 FCC 2d 52, 53 (1969).

Because none of the advertisements informed non-purchasers how, when and where they could participate and obtain free chances, the licensee cannot legitimately claim that there was equal availability between purchasers and non-purchasers. Accordingly, consideration was present and the announcements described promotions that were lotteries.

CONCLUSION

In sum, you appear to have aired an advertisement for a scheme that contained all of the characteristics of a lottery. Accordingly, Corpus Christi Media Partners L.P., from September 24, 1990, through October 12, 1990, willfully and repeatedly violated the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules. We are assessing a forfeiture only against Station KRYS-FM. Action against KRYS(AM) is barred by the Statute of Limitations (*see* 47 U.S.C. § 503(b)(6)) because the Commission granted its renewal after the violation occurred which was more than one year ago. You are hereby admonished with respect to the apparent violation on KRYS(AM).

Accordingly, pursuant to Section 503(b) of the Communications Act, Corpus Christi Media Partners, L.P., Licensee of Radio Station KRYS-FM, is hereby advised of its apparent liability for a forfeiture of six thousand two hundred and fifty dollars ($6,250).

The forfeiture amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under our new forfeiture standards, the base amount for a violation of the the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules is six thousand two hundred and fifty dollars ($6,250).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cincinnati Bell Telephone Company — Transmittal No. 605

Revisions to Tariff F.C.C. No. 35

ORDER

Adopted: March 4, 1992; Released: March 5, 1992

By the Chief, Common Carrier Bureau:

1. Cincinnati Bell Telephone Company (CBT) filed Transmittal No. 605 on January 21, 1992, to increase its current rates for common line, switched traffic sensitive, and special access services. CBT contends its filing corrects annual access rates that became effective July 1, 1991. [1] According to CBT, a $1.8 million reduction in CBT's interstate access revenue requirement should be eliminated because it was premised on an incomplete view of CBT's trended cost growth. CBT, Tr. 605, Description and Justification at 2. Transmittal 605 is scheduled to become effective March 5, 1992.

2. CBT claims that the trend model used by the Bureau in the *1991 Access Tariff Order* to evaluate CBT's Telephone Plant-in-Service (TPIS) did not accommodate both a trend shift in CBT's TPIS investment after 1988 -- due to a mandated change in the Uniform System of Accounts -- and an aggressive CBT modernization program. Also, CBT says that the Bureau's model did not account for certain statistical qualities of the TPIS data. CBT suggests a different model which, if it had been used by the Bureau, would not have resulted in any TPIS disallowance for CBT. *Id.* at 2-3.

3. On January 28, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject, or alternatively to suspend and investigate, the above transmittal. CBT replied to that petition on February 6, 1992. MCI urges the Commission not to accept CBT's TPIS trend model because CBT fails to show that its model is a more valid predictor of local exchange carrier (LEC) TPIS forecasts than the Bureau's model. MCI Petition at 34. In addition, MCI asserts that the actual TPIS data included with CBT's transmittal show that the Bureau was justified in reducing the level of TPIS investment forecasted by CBT. Thus, MCI contends that at least $624,000 of the Bureau's earlier $1.8 million TPIS disallowance should be retained. *Id.* at 4-5.

4. CBT replies that the Bureau should adopt CBT's model because that model best fits the available TPIS data (including the trend shifts) and therefore provides the most accurate prediction of future TPIS investment. CBT Reply at 2. CBT says that the Bureau could also simply exclude from the application of its model all data prior to those trend shifts and that such an approach would be consistent with the Bureau's treatment of anomalous data noted by other LECs in their access filings. *Id.* at 3-4. With regard to MCI's claim that CBT's transmittal data support a portion of the Bureau's earlier disallowance, CBT says MCI fails to realize that the actual data cited is only an average for the first five months of the tariff year and not a prediction of the average rate base for the entire year. *Id.* at 5.

5. The Common Carrier Bureau has reviewed CBT Transmittal No. 605 and all related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or alternatively to suspend and investigate Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Transmittal No. 605, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Annual 1991 Access Tariff Filings, Memorandum Opinion and Order, 6 FCC Rcd 3792 (Com.Car.Bur. 1991) (*1991 Access Tariff Order), petitions for reccon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-122

In the Matter of:

Clarification of Commission Policies
Regarding Spousal Attribution

POLICY STATEMENT

Adopted: February 13, 1992; Released: March 9, 1992

By the Commission:

INTRODUCTION

1. This Policy Statement concludes the Commission's inquiry into its spousal attribution policy, under which the media interests of one spouse are presumptively attributed to the other for purposes of the multiple ownership and cross-ownership rules (the "ownership rules").[1] The policy adopted herein eliminates the presumption of spousal attribution and establishes the same attribution standards for spousal relationships that govern the attribution of media interests for other family relationships.[2] Hereafter, the media interests of one spouse will not be presumptively attributed to the other solely on the basis of marital status. Rather, the Commission will review the relationship between the spouses and their respective media interests to determine whether attribution of their media interests is necessary to preserve the objectives of economic competition and diversity. As with all family relationships, spouses' media interests will not be attributed where the spouses' disclosures confirm that such media interests are independently held and are not subject to common influence or control. This revision in our spousal attribution policy will remove undue restrictions on spouses acquiring separate and independent media interests and afford marital status treatment similar to that afforded to other family relationships. The policies we adopt herein also will serve the public interest by ensuring that the economic competition and diversity interests that underlie the ownership rules are not improperly compromised.

BACKGROUND

2. The Commission first established the presumption of spousal attribution in *Lady Sarah McKinney-Smith*.[3] In that 1976 decision, the Commission held that the owners of two AM stations with overlapping signals, who planned to marry, would have their respective media interests attributed to each other upon their marriage. The Commission's rationale for establishing this presumption of attribution, which differed from the treatment of other family relationships, was that the marital relationship is typically a closer relationship characterized by less independence than other family relationships. For this reason, we concluded that the spousal relationship was not likely to result in the normally expected arm's length competition in the operation of two separately owned stations.[4]

3. Notwithstanding its determination that the marital relationship would result in a presumption of attribution, the Commission waived the multiple ownership rules in that case, finding that: (1) no acquisition of a license was involved; (2) the national ownership limits would not be violated; (3) the facts showed a lack of intent to evade the ownership rules (since both parties held their respective interests before marrying); (4) the parties entered into a prenuptial agreement ensuring that the operation and control of each station would remain independent; and (5) a large number of similar requests was unlikely to result. This analytic framework evolved into the criteria for granting waivers of the ownership rules in subsequent spousal attribution cases.[5]

4. Later, in *Attribution Reconsideration Decision*, where we revised the attribution rules, we stated that despite the near "conclusive nature" accorded the presumption of spousal attribution, the Commission would "henceforth permit this presumption to be rebutted, on a case-by-case basis, in 'appropriate circumstances.'" With respect to family relationships generally, we indicated that we would continue to evaluate the facts and circumstances in specific cases to determine whether or not it was appropriate to attribute interests on the basis of a close familial relationship.[6]

5. In *Marvin J. Diamond*,[7] we found for the first time that sufficient facts had been presented to rebut the presumption of spousal attribution.[8] In that case, Paramount Communications Corporation intended to acquire an interest in TVX Broadcast Group. The Senior Vice President and Chief Financial Officer of Paramount was married to the Treasurer of Times Mirror Corporation, and attribution of their interests would have resulted in numerous violations of the multiple ownership rules. In finding that the presumption of attribution was successfully rebutted, the Commission relied on the following facts: (1) the spouses' employers were both large multifaceted companies with diverse interests; (2) neither

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[1] 47 C.F.R. §§ 73.3555, 76.501 (1990). *See Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *reconsidered in part*, 58 RR 2d 604 (1985) (*"Attribution Reconsideration Decision"*), *further reconsidered*, 1 FCC Rcd 802 (1986).

[2] The *Notice of Inquiry* (*NOI*), 6 FCC Rcd 2492 (1991), expressly limited the scope of this proceeding to the application of spousal attribution to the ownership rules. Therefore, the policies we adopt today are similarly restricted and do not address the application of spousal attribution in determining integration or diversification credit in the context of comparative hearings.

[3] 59 FCC 2d 398 (1976)(*"McKinney-Smith"*).

[4] *McKinney-Smith*, 59 FCC 2d at 401.

[5] *See, e.g., Richard R. Zaragoza*, 2 FCC Rcd 5078 (1987); *Marvin J. Diamond*, 4 FCC Rcd 8526 (1989).

[6] *Attribution Reconsideration Decision*, 58 RR 2d at 620.

[7] *Marvin J. Diamond*, 4 FCC Rcd at 8528.

[8] In the earlier spousal attribution decisions the Commission attributed spouses' media interests but granted waivers of the ownership rules.

spouse was exclusively concerned with his or her employer's media interests; (3) both spouses had long pursued independent careers and had not acted personally to initiate the acquisition involved; and (4) the spouses entered into an agreement requiring them to insulate their business activities from one another.

PROPOSAL

6. The presumption of spousal attribution is premised on the view that the marital relationship, by its nature, is not conducive to arm's length competition or the promotion of diversity. However, as we explained in the *NOI* in this proceeding, we are concerned that the consequences of the presumption of spousal attribution are unduly restrictive and serve to hamper the media activities of married couples. Additionally, we recognize that as more women enter the broadcast industry, the presumption of spousal attribution will increasingly impede their entry into ownership and managerial positions, thus placing our attribution policy at odds with our equal employment opportunity policies encouraging the entry and advancement of women in the broadcast industry. As a consequence, we proposed to relax the standards applicable to the presumption of spousal attribution.

7. Specifically, the *NOI* proposed that, with respect to the ownership rules, a presumption of no spousal attribution would operate when spouses demonstrate a history of separate business interests and independent careers and expressly represent that this past independence will continue. We suggested that the indicia used to demonstrate the requisite independence might include, but would not be limited to, a showing that neither spouse holds any financial interest in the other spouse's media interest or its communications subsidiary; that neither provides services for or on behalf of the other spouse's media company; and that neither is involved in the management, operation or finances of the other's media company. Further, we stated that, at a minimum, spouses making the representation of continued independence would be required to disclose whether and to what extent any financial interest or relationship exists between each spouse and the other spouse's media employer.

8. The *NOI* solicited comments on the sufficiency of these proposed criteria for establishing a presumption of non-attribution, and on whether we should broaden or narrow the circumstances in which we would apply the presumption. We also inquired as to the relevance of the type of ownership interest involved and the circumstances of the market at issue. Specifically, we questioned: (1) whether greater assurances as to a spouse's independence should be required where stations are in the same service and in the same market than where the national ownership limits are at issue; and (2) whether the availability of alternative services should be considered where the stations are located in the same market. The *NOI* tentatively concluded that the proposed guidelines would serve the public interest by removing undue restrictions on married couples pursuing independent media careers, while preserving the purposes of the spousal attribution policy by ensuring arm's length competition and promoting diversity. Five parties filed comments in this proceeding.[9]

COMMENTS

9. All of the commenting parties generally supported our endeavor to reform the spousal attribution policy. Most commenters, however, indicated that the proposal contained in the *NOI* continues to be unduly restrictive and represents an insignificant modification of our established policy. In addition, most of the commenters stated that the requisite showing of a "history of separate business interests and independent careers" unfairly excludes from consideration spouses who have had common business interests in the past or who have not yet established careers. A majority of commenters recommended eliminating the presumption of spousal attribution entirely.[10]

10. AWRT advocates that we abolish the presumption of spousal attribution and implement a presumption of no attribution, which may be rebutted by a challenger. Rather than forcing spouses to make a threshold showing of independence in order to be entitled to a presumption of no attribution, as the *NOI* suggested, AWRT proposes that spouses be required to disclose all media interests and certify that such interests are and will remain independent. Athens, Gammon & Grange and Withers advocate that we abolish the presumption of spousal attribution and apply the same attribution criteria that we apply to all non-marital family relationships. Under those criteria, the existence of such a family relationship alone is insufficient to create a presumption of common control for purposes of applying the ownership rules.[11] Rather, Commission practice is to evaluate the facts and circumstances on an *ad hoc* basis to determine whether or not a close family relationship justifies attribution.

11. Only Paramount supports the specific proposal contained in the *NOI*. Paramount suggests, however, that the criteria established by the Commission in *Marvin J. Diamond* to rebut the presumption of attribution be employed as the criteria to demonstrate independence with respect to spouses' media interests.[12] Paramount suggests that such criteria be incorporated in a note to the Commission's ownership rules, and that all applicants seeking non-attribution be required to certify their present and future compliance with these criteria.

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[9] The commenting parties were: American Women in Radio and Television, Inc. ("AWRT"), Athens Broadcasting Inc. ("Athens"), Gammon & Grange, Paramount Communications, Inc. ("Paramount"), and Russell Withers, Jr. and Kathy J. Withers ("Withers").

[10] The pleadings of AWRT, Athens, Gammon & Grange and the Withers recommended eliminating the presumption of spousal attribution.

[11] *Stuart W. Epperson*, 1 RR 2d 521, 525 (Rev. Bd. 1963); *L&S Broadcasting Co.*, 9 RR 2d 423, 426 (1967); *KTRB Broadcasting Company, Inc.*, 46 FCC 2d 605, 607 (1974); *Alabama Radio Corporation*, 69 FCC 2d 1256, 1263 (1978).

[12] *Marvin J. Diamond*, 4 FCC Rcd 8528 (1989). Paramount characterizes the criteria established in this case as requiring spouses to represent that they will not: (1) acquire interests in each other's media company; (2) hold any joint interests in any media company subject to FCC regulation; (3) provide each other with non-public business records pertaining to their media interests; (4) act as an employee, agent or contractor for, or participate in the management or operation of, the other's media company; (5) provide financial assistance for the other's media interests; or (6) exchange personnel, equipment, or nonpublic information regarding the operations or planning of their media companies.

DISCUSSION

12. After reviewing the comments submitted in this proceeding and reconsidering the issue of spousal attribution, we are persuaded that the presumption of spousal attribution should be eliminated and the spousal relationship should be afforded treatment similar to that afforded other close family relationships. As noted in the *NOI*, since we first created the presumption of spousal attribution in 1976, there has been a significant increase in the number of married couples in which both spouses pursue separate and independent careers.[13] Because of this increase, we believe that it is no longer appropriate to presume that married couples are unlikely to act independently of each other and thus that the spousal relationship poses a threat to economic competition and diversity. In addition, we believe that the presumption of spousal attribution necessarily impedes the entry of married individuals into ownership and managerial positions in the broadcast industry by requiring divestiture of interests that, if attributed, would result in a violation of the ownership rules.

13. We conclude that the public interest would be better served if attribution in spousal relationships, like all other family relationships, is determined based on the specific facts and circumstances presented. While this approach differs slightly from the proposal set forth in the *NOI* (in that we are not requiring an initial showing that an applicant is entitled to a presumption of non-attribution), we have retained the elements of that proposal designed to protect our legitimate interests in competition and diversity. Under our adopted approach, the Commission must be satisfied in each case that the spouses' media interests are independent, and that a marital relationship is not being used to evade the ownership rules. To that end, all family relationships must be disclosed and described in full, and we retain the option of requiring submission of further information and explanation if necessary. This process will enable us to evaluate carefully whether the spouses in fact will act independently of each other, and at the same time will avoid imposing burdensome and potentially misplaced presumptions on married individuals.

14. In considering the presumption of spousal attribution, we reviewed the treatment of spousal attribution in other regulatory contexts. As we noted in *Attribution of Ownership Interests*, no other regulation "more closely parallels in purpose our own concerns [in defining attributable ownership interests] than the stockholding disclosure requirements of the Securities and Exchange Commission."[14] In this regard, it is significant to note that SEC policy does not presume attribution of stock ownership between spouses for purposes of its filing requirements. The purpose of the SEC disclosure requirement is to provide the public with information about entities that have acquired significant ownership interests in, and are therefore in a position to influence the operation of, publicly traded companies. Our attribution rules are similarly concerned with identifying ownership interests that confer on the holder of such interest the ability to influence or control station decisions.

15. Under existing policy, applicants for new construction permits and for transfers or assignments of licenses are required to report the broadcast interests of all immediate family members (parents, siblings and offspring, as well as spouses) of any party to the application. In addition, applicants must file exhibits to these applications, which provide full disclosure regarding the nature and extent of such familial interests. The Commission reviews these disclosures to determine whether the media interests of family members are subject to the common ownership, influence or control of other family members. Where family relationships are intertwined with business interests the Commission has a legitimate concern as to compliance with the ownership rules, and in such situations, family members have the burden of establishing in their applications that, despite a close family relationship, the broadcast interests involved are (or will be) independently owned and operated.[15] We believe that these disclosure procedures have fully safeguarded competition and diversity in the context of close family relationships, and will effectively serve the same end if applied as well to spousal relationships.

16. The factors the Commission has relied upon in finding the requisite degree of independence with respect to other family relationships should serve as a guide for spouses seeking to establish independence. The Commission's policy with respect to attribution in family relationships has always been to attribute such interests only in those circumstances in which our policies favoring economic competition and diversity are implicated. In deciding attribution issues in the context of close family relationships, the Commission has considered the following factors to be relevant:

(1) Representations that the media interests of close family members will be independent and will not be subject to common influence or control;[16]

(2) Commingling of ownership or other interests in media businesses;[17]

(3) Participation by family members in the financial affairs, programming and personnel decisions of each other's media interests;[18]

(4) Prior broadcast experience of the individual seeking to establish independent interests;[19]

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[13] *NOI*, 6 FCC Rcd at 2493. According to the Bureau of Labor Statistics, the percentage increase from 1976 to 1991 of total married couples with both spouses earning income rose from 48 percent to 59 percent. *See* U.S. Department of Labor, Bureau of Labor Statistics -- Unpublished Data from Current Population Survey, March 1991; U.S. Department of Labor, Bureau of Labor Statistics, *Handbook of Labor Statistics*, August 1989, Bulletin 2340, Table 61, page 255.

[14] 97 FCC 2d at 1006.

[15] *Alabama Radio Corporation*, 69 FCC 2d at 1262; *Arnold L. Chase*, 67 RR 2d 815, 818 (1990).

[16] *Southern Indiana Broadcasters , Inc.*, 14 RR 117, 120 (1956); *KTRB Broadcasting Company, Inc.*, 46 FCC 2d 605, 608-09 (1974); *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983).

[17] *Arnold J. Chase*, 67 RR 2d at 817-18; *Southern Indiana Broadcasters, Inc.*, 14 RR at 120.

[18] *Rayne Broadcasting Co., Inc.*, 67 RR 2d at 1503; *Dorothy J. Owens*, 68 RR 2d at 846; *Stuart W. Epperson*, 1 RR 2d at 526-27.

[19] *Stuart W. Epperson*, 1 RR 2d at 525; *Southern Indiana*

(5) Financial independence;[20]

(6) Sharing of personnel, equipment, contractors or information regarding programming; [21]

(7) Involvement by family members in the acquisition or application process.[22]

17. In evaluating non-spousal family relationships, we have recognized that family relationships have many characteristics, such as financial and business ties, which in a non-family relationship would be indicia of common ownership or control.[23] We do not, however, attribute interests based solely on these characteristics since they are often part and parcel of the relationship, and attribution would thus create unfair obstacles to media ownership. Similarly, we recognize that spousal relationships possess certain qualities that in other family relationships may indicate common influence or control, but which, if used to justify attribution in a spousal setting, would undermine our efforts in this proceeding. Independence, for example, has been shown where adult children demonstrate emancipation and financial independence from their parents.[24] Spouses, on the other hand, live together and may not have segregated finances. In a spousal setting, however, these attributes are not particularly indicative of a lack of independence; rather they are common characteristics of a marriage relationship. Accordingly, these circumstances alone would not be sufficient to question the assertion of independence in a spousal situation.

18. Where the Commission finds that the media interests of spouses are subject to common influence or control, their media interests will be attributed to one another. If we are unable to determine the independence of spouses' media interests based on the disclosure provided, we may in our discretion request additional information necessary to make such a determination. As has always been our policy, if it appears that spouses (or other family members) have misrepresented the nature or extent of their media interests in order to evade the ownership rules, we will apply the full weight of available sanctions.

19. In the *NOI* we questioned whether the nature of the spouses' media interests should affect the level of assurance we require to establish independence. Paramount asserts that the nature of the attributable interest should not affect the Commission's determination as to whether spouses are independent. AWRT advocates the adoption of a policy of no spousal attribution in situations involving spouses who hold positional interests, such as officers or directors, in different media companies in the same market. Given that the presumption of spousal attribution is eliminated herein, we believe that it is unnecessary to amend our attribution standards to distinguish generally between ownership and positional interests in cases involving spousal attribution. Where the spouses' disclosure confirms that the spouses' media interests are independent, they will not be mutually attributable regardless of the nature of the media interests at issue.[25] Where independence is not established, the positional interest at issue can still be determined not to be attributable on the basis of the nature of the position and its impact on or relevance to broadcast operations.[26]

20. With respect to the issue we raised in the *NOI* regarding the relevance of market conditions, we conclude that market conditions should not influence our determination of whether spouses' interests are attributable. As Paramount indicated in its pleadings, the relevant issues for purposes of attribution are the relationship between the spouses and their respective media interests, not the number of other media outlets in the market. Market conditions, such as the size of the market and the level of alternative service, are not relevant to the determination of whether spouses' media interests are subject to common influence or control.[27]

CONCLUSION

21. We believe that the elimination of the presumption of spousal attribution is necessary to effect equity and consistency in the application of the ownership rules. We are confident that the less restrictive attribution standards we apply to all other family relationships are fully adequate to safeguard the objectives of the ownership rules in the context of spousal relationships. As with all family relationships, the Commission will review spouses' disclosures regarding their media interests to determine that those interests will be managed independently. If, on the basis of such disclosures, we are satisfied that the spouses' media interests are independent and are not subject to common influence or control, such interests will not be attributed. The foregoing policies will serve the public interest by removing undue restrictions on married couples pursuing separate and independent media interests while ensuring that the objectives of economic competition and diversity inherent in the ownership rules are protected. To further ensure such protection, we note that

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Broadcasters, Inc., 14 RR at 117. (That such experience was obtained from employment in a family owned media company is not necessarily indicative of common influence or control.)

[20] *Stuart W. Epperson*, 1 RR 2d at 526; *High Sierra Broadcasting Inc.*, 96 FCC 2d at 435; *Dorothy J. Owens*, 68 RR 2d at 846. (The provision by family members of financial assistance, loans or loan guarantees in arm's length transactions is not necessarily indicative of common ownership, influence or control unless coupled with the ability or intent to exercise control to protect financial position.) *But see Arnold J. Chase*, 67 RR 2d at 818; *Rayne Broadcasting Co., Inc.*, 67 RR 2d at 1503.

[21] *Arnold J. Chase*, 67 RR 2d at 818; *Alabama Radio Corporation*, 69 FCC 2d at 1262.

[22] *Rayne Broadcasting Co. , Inc.*, 67 RR 2d at 1502-03.

[23] *Rayne Broadcasting Co., Inc.*, 67 RR 2d 1501, 1503 (Rev. Bd. 1990); *Dorothy J. Owens*, 68 RR 2d 842, 846 (1990); *Arnold L. Chase*, 67 RR 2d 815, 818 (1990).

[24] *Valley Broadcasting Co.*, 58 RR 2d 945, 946 (1985). *But see KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605 (1974) (holding that student son living at home was independent of his father whom he replaced as an investor in the acquisition of a broadcast station).

[25] Under the policy established herein, disclosure of facts similar to those presented in *Marvin J. Diamond* would be considered sufficient confirmation of independence and would thus not lead to attribution.

[26] *See, e.g., Attribution of Ownership Interests*, 97 FCC 2d at 1025-26.

[27] Although not relevant to spousal attribution determinations, market conditions would of course still be relevant to requests for waivers of the underlying ownership rules. *See e.g.*, 47 C.F.R. § 73.3555, n. 7 (1990).

in individual cases the Commission may on its own initiative request any additional relevant information or assurances it deems necessary in order to assess whether family relationships, including spousal relationships, should give rise to attribution of ownership.

ORDERING CLAUSES

22. For the foregoing reasons, IT IS ORDERED that, pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, the language explaining our prior presumption of spousal attribution will be deleted from all relevant Federal Communication Commission forms and reports.

23. IT IS FURTHER ORDERED that the policies adopted herein will become effective upon publication of this Policy Statement in the *Federal Register*. *See* 5 U.S.C. § 553(d)(2).

24. For further information about this proceeding, contact Jacqueline Chorney, Federal Communications Commission, Policy and Rules Division, Mass Media Bureau, Washington, D.C. 20554, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-170

In the Matter of

Spectrum Efficiency in the
Private Land Mobile Radio
Bands In Use Prior to 1968

ORDER EXTENDING REPLY COMMENT PERIOD

Adopted: February 24, 1992; Released: February 26, 1992

By the Chief, Land Mobile & Microwave Division, Private Radio Bureau:

1. On July 2, 1991, the Commission released a *Notice of Inquiry*, 6 FCC Rcd 4126 (1991), in this proceeding. The specified deadlines for comments and reply comments were October 25, 1991 and December 13, 1991, respectively. On September 23, 1991, we released an *Order Extending Comment and Reply Comment Periods*, 6 FCC Rcd 5513 (1991), extending the deadline for filing comments and reply comments to January 15, 1992, and March 2, 1992, respectively. On February 14, 1992, the Special Industrial Radio Service Association, Inc. filed a petition on behalf of itself, the National Association of Business and Educational Radio, Inc., the American Petroleum Institute, the American Mobile Telecommunications Association, Inc., the Telephone Maintenance Frequency Advisory Committee, and the Council of Independent Communication Suppliers ("Joint Commenters"), requesting that we extend the date for filing Reply Comments in this proceeding to May 1, 1992. On February 21, 1992, the Utilities Telecommunications Council (UTC) filed a petition requesting that we extend the date for filing Reply Comments by two to four weeks.

2. As the basis for its request, the Joint Commenters cited the importance of the proceeding, the large number of comments filed, the International Mobile Communications Exposition, and deadlines on other rule making proceedings. UTC also cited the number and complexity of comments filed. Because there are over sixty comments subject to reply in this Docket, we conclude it is in the public interest to extend the reply comment deadline. We find, however, that an extension of more than 14 days is excessive, especially given that we already extended the reply comment deadline by eighty days. Accordingly, IT IS ORDERED, based on the authority in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the petition of UTC IS GRANTED, that the petition of the Joint Commenters IS DENIED, and, that the deadline for filing reply comments in the subject *Notice of Inquiry* is extended to **March 16 , 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 2, 1992

ASSOCIATION OF COLLEGE AND UNIVERSITY TELECOMMUNICATIONS ADMINISTRATORS FILES PETITION FOR CLARIFICATION REGARDING CLASSIFICATION AS "CALL AGGREGATORS"

The Association of College and University Telecommunications Administrators, the American Council on Education, and the National Association of College and University Business Officers (collectively the "Higher Education Parties") have filed a Petition for Clarification of the Commission's determination in CC Docket 90-313 that universities are "call aggregators" as defined in § 226(a)(2) of the Communications Act. They request that the Commission make clear that colleges and universities are "call aggregators" only with respect to pay telephones on their campuses.

In the Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. § 226 ("TOCSIA"), an aggregator is defined as "any person that, in the ordinary course of operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2). The Commission in its *Report and Order* in CC Docket 90-313, 6 FCC Rcd 2744 (1991), adopted the Congressional definition *verbatim* and concluded that universities are "clearly within the scope of the definition of 'aggregator.'" 6 FCC Rcd at 2752. The Higher Education Parties maintain that, notwithstanding this ruling, colleges and universities are not aggregators, except with respect to campus pay telephones.

Parties wishing to comment on this matter may do so not later than March 31, 1992. Reply comments should be filed not later than April 17, 1992. All filings concerning this matter should refer to File No. ENF-92-03. A copy of the petition for clarification and any subsequently filed documents in this matter may be obtained from the Downtown Copy Center, 1142-21st Street, N.W., Washington, D.C. 20036 and in Room 246 at 1919 M Street, N.W., Washington, D.C. 20036 (202) 452-1422. The petition and documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250-23rd Street, N.W., Washington, D.C. 20554. For further information, contact Sally J. Novak at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 4, 1992

JOINT PETITION AND ASSOCIATED FILINGS BY AT&T, ALASCOM, AND TUA REGARDING ALASKA TELECOMMUNICATIONS SERVICES AND PETITION TO ESTABLISH REGULATORY POLICIES CONCERNING THE ALASKA TELECOMMUNICATIONS MARKET STRUCTURE FILED BY GENERAL COMMUNICATIONS, INC.

(CC Docket No. 83-1376)

The American Telephone and Telegraph Company (AT&T), Alascom, Inc. (Alascom), and Telephone Utilities of Alaska, Inc. (TUA) have filed a Joint Petition requesting the Commission to approve a Master Agreement between the parties for the provision of Alaska telecommunications services. General Communication, Inc. (GCI) has filed a petition requesting that the Commission commence a proceeding to establish new arrangements for the provision of interstate MTS/WATS service to and from Alaska.

The Joint Petition filed by AT&T, Alascom, and TUA requests approval of the Master Agreement between the parties pursuant to which: (1) AT&T and Alascom will terminate their existing joint service arrangement for MTS/WATS services between Alaska and the lower 48 states; (2) AT&T will acquire Alascom's interstate and international MTS/WATS services and AT&T will provide those services now provided with Alascom; (3) Alascom will transfer to TUA the assets necessary for TUA to provide interstate access services to AT&T and other interexchange carriers wishing to use its services in Alaska; and (4) AT&T will lease for up to 15 years facilities from TUA and Alascom that will enable AT&T to extend its communications network to Alaska. The Master Agreement provides that it will become effective only if the Joint Petition and all the related documents and transfers underlying the agreement are approved by November 1, 1992.

The Joint Petition additionally requests that the Commission approve waivers of certain provisions of the Commission's Part 36 separations rules and Part 69 access rules to allow TUA to implement a five year transition in separations procedures from the use of a "frozen allocator" factor to the use of a "circuit termination" factor; terminate the CC Docket No. 83-1376 Alaska inquiry at the conclusion of this proceeding; and provide for TUA's continued participation in the National Exchange Carrier Association (NECA) Carrier Common Line and Traffic Sensitive pools. TUA has filed a petition for waiver of the frozen study area definition and related rules to include the entire state of Alaska within its study area.

AT&T, Alascom, and/or TUA have filed the following Section 214 and radio facility applications pursuant to the Master Agreement: (1) a Section 214 application filed by TUA and Alascom to transfer to TUA all lines of communication currently used by Alascom for provision of interstate and international MTS/WATS service within the state of Alaska (File No. W-P-C 6774); (2) a Section 214 application by AT&T and Alascom for Alascom to withdraw its FCC Tariffs 9 and 10, except for service to Magadan Russia, and for AT&T to extend its lines to provide interstate and international service between points in Alaska and foreign and domestic points outside of Alaska (File No. W-P-C 6771); (3) applications by Alascom for consent to *pro forma* assignment to TUA of 191 common carrier domestic satellite earth station licenses (File No. 638-DSE-AL-92(191)), an authorization for the Aurora II domestic-fixed satellite (File No. 25-DSS-AL92), and 104 common carrier domestic fixed point-to-point microwave licenses (File No. 13099-CF-AL-(104)-92).[1]

Alascom and TUA are wholly owned subsidiaries of Pacific Telecom, Inc.

The Joint Petition states that TUA is filing an Amendment and Extension of Certificate of Public Convenience and Necessity with the Alaska Public Utilities Commission, and a report to the Justice Department pursuant to the Hart-Scott-Rodino Antitrust Improvements Act.

In its petition, GCI requests that the Commission commence a proceeding to establish new arrangements for the provision of interstate MTS/WATS service to and from Alaska. GCI states that the Joint Services Arrangement involving AT&T and Alascom under which these services are provided no longer serves the public interest.

GCI proposes that the Commission end the Joint Service Arrangement no later than five years from initiation of its requested proceeding. GCI proposes that the Commission establish certain transition requirements until elimination of the Joint Service Arrangement, including that AT&T would control all Alascom costs reimbursed through the Joint Service Arrangement and would compensate Alascom for its investment made in reliance on the Joint Service Arrangement. After the termination of the Joint Service Arrangement, GCI's proposal provides that: (1) AT&T would have the direct authority and responsibility for providing universal interstate MTS/WATS service to and from Alaska; (2) Alascom could retain its MTS/WATS customer base and network if it chose to do so and would be regulated as a nondominant carrier to the extent that it continues to provide any service to AT&T or provides service to any location where it is the sole carrier; and (3) Alascom would not be permitted to combine any existing interexchange and local exchange revenues, costs, entities or operations.

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[1] Alascom and/or TUA have additionally filed an application for consent to *pro forma* assignment to TUA of 40 common carrier rural radio licenses (File No. 60080-CR-AL-1-92), and applications for consent to *pro forma* assignment of 29 private radio telephone maintenance radio licenses (File Nos. 339171 to 339199). See Parts 1 and 22 of the Commission's rules, 47 C.F.R. Parts 1 and 22, respectively, for procedural requirements concerning public notice and filing of petitions with respect to these private radio and common carrier applications.

GCI states that its proposal would alter the scope of the existing Alaska Federal/State Joint Board proceeding in Docket No. 83-1376. GCI states that market structure issues should be determined by the Commission while separations issues could be referred to the Joint Board.

Interested partes may file consolidated comments, informal oppositions, and/or petitions to deny with respect to the Joint Petition filed by AT&T, Alascom, and TUA, including associated requests for waivers of Parts 36 and 69 of the Commission's rules and Section 214 and radio facility applications, and the GCI petition, on or before **April 3, 1992** and replies thereto on or before **May 4, 1992.** An original and five copies should be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Additional copies should be sent to the following: five copies to Peggy Reitzel, Common Carrier Bureau, Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554; five copies to Jay Atkinson, Common Carrier Bureau, Federal Communications Commission, Room 257, 2000 L St. N.W., Washington D.C. 20554; one copy to James R. Keegan, Common Carrier Bureau, Federal Communications Commission, Room 6010, 2025 M. Street N.W., Washington D.C. 20554; one copy to Cecily Holiday, Common Carrier Bureau, Federal Communications Commission, Room 6324, 2025 M. Street N.W., Washington D.C. 20554; one copy to Robert James, Common Carrier Bureau, Federal Communications Commission, Room 6310, 2025 M. Street N.W., Washington D.C. 20554; one copy to Jim Loughry, Common Carrier Bureau, Federal Communications Commission, Room 644, 1919 M. Street N.W., Washington, D.C. 20554; one copy to W. Riley Hollingsworth, Private Radio Bureau, Federal Communications Commission, 1270 Fairfield Rd., Gettysburg, Pennsylvania 17325-7245; and one copy to the Downtown Copy Center, the Commission's contractor for public records duplication, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037, (202) 452-1422. The petitions and associated filings are, and filings in response to this Public Notice will be when filed, available for inspection and photoduplication in Room 239, 1919 M. Street, N.W., Washington, D.C. 20554, 9:00 AM to 4:30 PM Monday-Friday. Copies may additionally be obtained from the Downtown Copy Center.

Parties should also send copies of filings to the following Alaska Joint Board Members and their staffs: Hon. Susan M. Knowles, Alaska Public Utilities Commission, 1016 West 6th Avenue, Suite 400, Anchorage, Alaska 99501; Hon. Bruce Hagen, North Dakota Public Service Commission, State Capitol Building, Bismarck, North Dakota 58505; Hon. Dean J. "Joe" Miller, Idaho Public Utilities Commission, 472 West Washington, Boise, Idaho 83702; Hon. David Rolka, Pennsylvania Public Utilities Commission, P.O. Box 3265, Harrisburg, Pennsylvania 17105; Ronald G. Choura, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan, 48910; Rowland Curry, Texas Public Service Commission, 7800 Shoal Creek Blvd. Suite 400N, Austin, Texas 78757, Lorraine Kenyon, Alaska Public Utilities Commission, 1016 West 6th Avenue, Suite 400, Anchorage, Alaska 99501; Barry Payne, North Dakota Public Service Commission, State Capitol Building, Bismarck, North Dakota 58505; Eileen Benner, Idaho Public Utilities Commission, 472 West Washington, Boise, Idaho, 83702; and Debra Kriete, Pennsylvania Public Utilities Commission, P.O. Box 3265, Harrisburg, Pennsylvania 17105.

Because these interrelated proceedings involve broad policy issues, they shall all be treated as non-restricted for purposes of the Commission's *ex parte* rules. See 47 C.F.R. §§ 1.1200(a), 1.1206.

For further information contact Patrick Donovan at (202) 632-4047, Rose Crellin at (202) 632-9342, or Kent Nilsson at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 9, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON MCI PETITION FOR PARTIAL RECONSIDERATION AND PACIFIC BELL APPLICATION FOR REVIEW OF ONA WAIVER ORDER

CC Docket No. 89-79
CC Docket No. 88-2

On March 2, 1992, MCI Telecommunications Corporation filed a petition for reconsideration of the Common Carrier Bureau's January 31, 1992 ONA Waiver Order. MCI asks the Bureau to reverse its approval of NYNEX's request to refrain from tariffing Direct Inward Dialing (DID) and Dialed Number Identification Via Inwats to DID (DNIS on 800). Also on March 2, Pacific Bell filed an application for review of the January 31, 1992 ONA Waiver Order. Pacific Bell states that its November 8, 1991 ONA Waiver Petition was in accord with the Commission's federal BSE tariffing requirement and should not have been denied.

Interested parties should file comments on the petitions by **March 24, 1992,** and reply comments by **April 3, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 6, 1992

COMMON CARRIER BUREAU LENGTHENS PLEADING DATES FOR BELL ATLANTIC PRICE CAP TARIFF TRANSMITTAL; FILING COULD INCREASE RATES UP TO $49.7 MILLION FOR CHANGES IN ACCOUNTING FOR POST-RETIREMENT BENEFITS FOR BELL ATLANTIC, BASED UPON AN INDUSTRY-WIDE STUDY FOR ALL LOCAL EXCHANGE COMPANIES UNDER PRICE CAPS

On February 28, 1992, the Bell Atlantic Telephone Companies filed Transmittal No. 497, to be effective July 2, 1992. The filing proposes increases in the company's price cap rate indexes. In its support information, Bell Atlantic justifies these increases as reflecting the incremental costs of implementing Statement of Financial Accounting Standards-106 (SFAS-106), "Employers Accounting for Post-retirement Benefits Other Than Pensions (OPEB). Prior to SFAS-106, OPEB benefits were generally booked on a "pay-as-you-go" basis, based on the amounts currently paid to retired employees. SFAS-106 requires that these benefits be recognized as deferred compensation and booked when the obligation to pay the benefits is incurred. SFAS-106 is a mandatory Generally Accepted Accounting Practice effective January 1, 1993 but may be voluntarily adopted earlier.

Bell Atlantic notified the Commission on December 31, 1991 of its intent to adopt SFAS-106 effective January 1, 1991. In the current filing, Bell Atlantic asserts that this change in accounting should be recognized as an exogenous cost change under the Commission's price pap plan. Specifically, Bell Atlantic claims that the change (1) is outside the carrier's control, (2) is compatible with regulatory accounting needs and is approved, (3) is not reflected in the inflation index of the price cap plan (GNP-PI) so there is no double counting of its impact, and (4) disproportionately affects local telephone companies. In support of the last two points, Bell Atlantic submits an econometric study commissioned by the United States Telephone Association (USTA). The overall increase in Bell Atlantic's interstate price cap rate indexes would be $49.7 million in the period July 1, 1992 through June 30, 1993 (Description and Justification, Workpaper 6-43).

An initial review of the Bell Atlantic transmittal indicates that it presents issues that are not limited to Bell Atlantic. The USTA study addresses the effects of SFAS-106 on all local telephone companies subject to the Commission's price cap plan.

Under these circumstances, the Bureau believes that interested persons should be granted a full opportunity to file petitions or comments that may aid the Commission in evaluating the issues raised by Bell Atlantic's transmittal. We are therefore lengthening the period for filing petitions under Section 1.773 of the Commission's Rules, 47 C.F.R. Sec. 1.773. Petitions should be filed no later than May 1, 1992. Replies should be filed no later than June 1, 1992.

For further information contact Dan Grosh, Common Carrier Bureau, Tariff Division at (202) 632-6388.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Company — Transmittal No. 485

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: March 9, 1992; Released: March 9, 1992

By the Chief, Common Carrier Bureau:

1. By Transmittal No. 485, Bell Atlantic Telephone Company (Bell Atlantic) offers "IntelliMux" Service for use with private line facilities. IntelliMux permits certain network management and reconfiguration functions to be performed either directly by the customer, or by Bell Atlantic at the customer's request. Transmittal 485 Description and Justification at 3. IntelliMux reconfigures customers' networks from remote locations using digital cross-connection systems and leased lines at the central office, where customers share use of a host computer. *Id.* at 2-3. Customers performing their own reconfigurations use their own terminals to access the host computer, which validates the reconfiguration commands before conveying them to the digital cross-connect system associated with the customer's service.

2. Bell Atlantic characterizes IntelliMux as a "new service" under the local exchange carrier price cap rules.[1] *Id.* It indicates that IntelliMux will produce at least $589,241 total revenue, and $62,488 net revenue on a present value basis, in the first year of services. Bell Atlantic also provides a projection of costs and revenues for a representative 12-month period, as well as cross-elasticities of demand. *Id.* at 10-12.

3. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 485, asserting that IntelliMux may violate prohibitions in the Modification of Final Judgment (MFJ) against LECs' offering interLATA communications services.[2] It further contends that if Bell Atlantic were found to be in violation of the MFJ, it would also be in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which requires that all practices in connection with common carrier service be just and reasonable. *Id.* at 2-3.

4. Bell Atlantic replies that there is no basis for MCI's claim that the service violates the MFJ because IntelliMux messages are used for network maintenance.[3] According to Bell Atlantic, it is Commission policy that a petitioner's claims of MFJ violations are insufficient to suspend or reject a tariff. *Id.* at 1-2.

5. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal 485 and the associated pleadings. We conclude that Bell Atlantic's tariff revision presents no question that warrants suspension or investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Telephone Company Tariff F.C.C. No. 1, Transmittal No. 485, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *See* Section 61.42 of the Commission's Rules, 47 C.F.R. § 61.42.

[2] MCI Petition at 2, *citing* United States v. AT&T, 552 F. Supp. 131 (D. D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983); United States v. Western Electric Co., 569 F. Supp. 1057 (D. D.C.), *aff'd sub nom.* California v. United States, 464 U.S. 1013 (1983).

[3] Bell Atlantic Reply at 2, *citing* United States v. Western Electric Co., 569 F. Supp. 1057, 1097 n.175, 1098 n.179 (D. D.C. 1983), *aff'd sub nom.* California v. United States, 464 U.S. 1013 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1992

PLEADING CYCLE ESTABLISHED FOR BOC AND GTE IMPLEMENTATION PLAN FOR 800 DATA BASE ACCESS SERVICE

CC Docket No. 86-10

On March 2, 1992, pursuant to the Commission's *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking* adopted August 1, 1991 in CC Docket No. 86-10, 6 FCC Rcd 5421 (*Reconsideration Order*), the Bell Operating Companies (BOCs) and GTE Service Corporation and its affiliated Domestic Telephone Companies (GTE) jointly filed an Implementation Plan for 800 Data Base Access Service (Plan). The Plan includes a detailed report on the progress of the BOCs, GTE, and other industry members in implementing this service.

Specifically, the Plan includes a description of the steps that have been taken to ensure a timely and nondisruptive implementation of 800 data base access as well as a description of and timeline for necessary future actions. The parties have also purported to describe the steps they are taking to ensure data base and network reliability in the provision of SS7 interconnection and 800 data base access. The Plan also includes a report on the progress the parties have made in making arrangements for participation by interexchange carriers and independent local exchange carriers in 800 data base access. In addition, it sets forth procedures for notifying 800 subscribers reasonably in advance of any change in their 800 services so that they can make any necessary adjustments to reflect changed call set up times and the availability of vertical service options. The Plan also describes issues necessary to 800 data base access implementation upon which agreement has not been reached among interested parties.

Interested parties should file comments on the Plan by **March 31, 1992,** and reply comments by **April 14, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Marian Gordon, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the Plan can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. Sections 1.1200-1.1216. For further information, contact Marian Gordon or Gary Phillips, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell and Nevada Bell
Petitions for Waiver of
Part 69 of the Commission's Rules

Dedicated Network Access Lines,
Open Network Architecture

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1992; Released: March 6, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements to be used by Bell Operating Companies (BOCs) when implementing Open Network Architecture (ONA).[1] ONA requires BOCs to unbundle various access offerings into Basic Service Elements (BSEs) and Basic Serving Arrangements (BSAs).[2] In addition, the *Part 69 ONA Order* requires BOCs to offer one lineside and one trunkside switched access BSA. Additional switched access BSAs, or the unbundling of a switched access "element other than a BSE, requires a waiver.[3]

2. On February 7, 1992, Nevada Bell filed a petition for waiver of the Commission's access rules to establish a separate element or subelement for dedicated channels between a customer's premises and a BOC central office that transmit network information or network control information between an enhanced service provider (ESP) and that BOC's network. On February 12, 1992, Pacific Bell filed a similar waiver petition. These channels are described as dedicated network access lines (DNALs), and only certain specific BSEs are presently associated with such channels.[4]

3. Pacific Bell also seeks to establish an interstate switched access Private Branch Exchange (PBX) Direct Inward Dialing (DID) BSA to support its Called Directory Number Delivery via DID BSE, and an interstate PBX Direct Outward Dial (DOD) BSA to support Answer Supervision with a Line Side Interface BSE.[5] Nevada Bell also seeks a waiver to establish PBX DID as a switched access BSA.[6] No one filed oppositions to these waiver requests.

II. BACKGROUND

4. In the *Part 69 ONA Order*, the Commission stated that DNALs described in BOC ONA plans appear to require Part 69 waivers.[7] In the *Southwestern Bell LIDB Order* and the *GTE LIDB Order*, the Common Carrier Bureau (Bureau) examined rate structures for facilities similar to the channels described as (DNALs in these petitions, and reached the same conclusions.[8] Specifically, at issue in those proceedings was the proper classification of the 56 kilobit per second (kbps) DS0 line used to connect an interexchange carrier's common channel signalling network to a local exchange carrier's common channel signalling network. The Bureau found that, since those facilities are "used to deliver, or facilitate the delivery of, switched access service," they should be tariffed as a transport subelement.

5. In the *Ameritech DNAL Waiver Order*, the Bureau adhered to the analysis originally announced in the *GTE LIDB Order* that facilities used to deliver switched services should be treated as transport.[9] The Bureau therefore granted Ameritech's request to waive the Commission's access rules to permit the establishment of transport subelements for Ameritech's DNALs. Following the *Ameritech DNAL Waiver Order*, several other BOCs filed petitions for waiver of the Part 69 rules to tariff DNALs used in conjunction with certain BSEs as separate elements or subelements. Those waivers were granted in the *BOC DNAL Waiver Order*.[10] Neither Nevada Bell nor

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[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order), petitions for recon. pending*. The BOCs' ONA plans had been previously approved. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*ONA Amended Plans Order)*. The BOCs are the Ameritech Operating Companies (Ameritech); the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth); New York Telephone Company and New England Telephone and Telegraph Company (NYNEX); Pacific Bell and Nevada Bell; Southwestern Bell Telephone Company (Southwestern Bell); and US West Communications, Inc. (US West).

[2] For a discussion of the definitions of "BSA" and "BSE", see *Part 69 ONA Order*, 6 FCC Rcd at 4525.

[3] *Part 69 ONA Order*, 6 FCC Rcd at 4527.

[4] Pacific Bell intends to offer the following BSEs in conjunction with DNALs: Make Busy Key, Message Desk (SMDI), Message Waiting Indicator - Activation (Audible), Message Waiting Indicator Activation (Visual), and Verify Integrity of Subscriber Lines. Pacific Bell Petition at 2. Nevada Bell intends to offer only Make Busy Key and Verify Integrity of Subscriber Lines in conjunction with its DNALs. Nevada Bell Petition at 4-5.

[5] The PBX DID would be a one way incoming trunk connecting the public switched network to a customer's PBX, and the PBX DOD would be a one way outgoing trunk connecting a customer's PBX to the public switched network. Pacific Bell Petition at 2-3.

[6] Nevada Bell also states that its DID PBX BSA will be used to support DID Trunk Queuing BSE. Nevada Bell Petition at 2-4.

[7] *Part 69 ONA Order*, 6 FCC Rcd at 4527 n.29.

[8] *GTE LIDB Order*, 6 FCC Rcd at 6110; *Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099.

[9] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Ameritech Petition for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, DA 91-1629, released December 27, 1991 (Com.Car.Bur.) (*Ameritech DNAL Waiver Order)*.

[10] Petitions for Waiver of Part 69 of the Commission's Rules,

Pacific Bell filed DNAL waiver petitions at that time because they had petitions for waiver to refrain from offering DNAL-associated BSEs pending before the Bureau. Subsequently, the Bureau denied Pacific Bell's petition,[11] and Nevada Bell withdrew its waiver petition.[12] Nevada Bell and Pacific Bell then filed the DNAL waiver petitions before us now.

III. DISCUSSION

A. DNAL BSAs

6. The waivers to establish these DNALs as BSAs sought by Pacific Bell and Nevada Bell are similar to waivers granted to other carriers. As we found in the case of prior waiver requests, Pacific Bell and Nevada Bell have shown good cause, within the meaning of Section 1.3 of the Commission's Rules,[13] to establish these DNALs as BSAs for reasons discussed in prior Bureau Orders.[14] Many of those DNAL waiver petitions specified that the costs of these DNALs should be recovered on a flat, monthly basis.[15] Accordingly, our grant of Pacific Bell's and Nevada Bell's waivers to establish DNALs as BSAs are conditioned on Pacific Bell and Nevada Bell establishing these services as flat-rated subelements of the transport rate element. Similarly, for the reasons discussed in the *Ameritech DNAL Waiver Order* and the *BOC DNAL Waiver Order*, we waive the requirements of the *Transport Rulemaking* Order to the extent necessary to enable Pacific Bell and Nevada Bell to tariff the DNALs used in conjunction with these BSEs as separate transport subelements.[16] We note, however, that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking* on the appropriate rate structure for transport.

B. PBX-Related BSAs

7. Pacific Bell alleges that it needs to establish an offering it describes as PBX DID as a BSA, prior to offering Called Directory Number Delivery via DID, and that it needs to establish PBX DOD as a BSA prior to offering Answer Supervision with a Line Side Interface as a BSE.[17] Nevada Bell claims that it must establish PBX DID as a BSA prior to offering DID Trunk Queuing, Make Busy Key, or Verify Integrity of Subscriber Lines as BSEs.[18] The Commission has ordered all BOCs to file tariffs for all BSEs listed in their ONA plans.[19] The Bureau has recently found that BOCs have a duty to seek waivers to establish any additional BSAs necessary to offer BSEs listed in their ONA plans.[20] Thus, Pacific Bell and Nevada Bell have shown good cause to establish PBX DID and PBX DOD as BSA alternatives, and accordingly, we grant these waivers.

8. Pacific Bell plans to establish non-usage-sensitive recurring rate subelements within the dedicated transport element for these BSAs.[21] Establishing non-usage sensitive rates in the transport rate element would also require a waiver of the Order in the *Transport Rulemaking*. In the *Transport Rulemaking*, the Commission established three goals for transport pricing. Any rules governing transport rates should promote efficient use of facilities by allowing the LECs to price in the manner that best reflects the way in which costs are incurred, should be conducive to full and fair interexchange competition, and should not interfere with the development of access competition.[22] Flat rate charges for the PBX-related BSAs before us satisfy those goals.

9. When the Commission applied these goals to the transmission services at issue in the *Transport Rulemaking*, it concluded that pricing should remain on a per-minute basis pending further Commission action. In reaching that conclusion, the Commission had to strike a balance among its three goals, since some goals would be satisfied by flat rate pricing, while other goals would be better served by a usage-based rate structure. In this case, however, there is no need to balance countervailing considerations in evaluating whether to price PBX-related BSAs on a flat rate basis, since flat rate pricing satisfies all three of the Commission's goals. Thus, while the result differs from that of the Order in the *Transport Rulemaking*, pricing these PBX-related BSAs on a flat rate basis does not conflict with the Commission's goals in the *Transport Rulemaking*. Finally, we note that no one opposed Pacific Bell's waiver request. We accordingly waive the requirements of that Order to the extent necessary to enable Pacific Bell to tariff the two PBX-related BSAs discussed in this Order, *supra*. We note, however, that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking* on the appropriate rate structure for transport.

10. Nevada Bell requested a waiver for its PBX-related BSA to establish a subelement within the transport rate element.[23] For reasons explained in the context of Pacific Bell's waiver request, we grant Nevada Bell a waiver to establish a flat monthly rate subelement in dedicated transport similar to the waiver granted to Pacific Bell. Again, we note that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking*.

Dedicated Network Access Lines, Open Network Architecture, DA 92-119, released January 30, 1992 (Com.Car.Bur.) (*BOC DNAL Waiver Order*).

[11] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Filing and Review of Open Network Architecture Plans, CC Docket Nos. 89-79, 88-2, DA 92-120, released January 31, 1992 (Com.Car.Bur.) (*Withdrawn BSE Waiver Order*), at paras. 25-32.

[12] Nevada Bell Petition at 3-4.

[13] Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[14] *Ameritech DNAL Waiver Order*, paras. 7-10, *BOC DNAL Waiver Order*, para. 6.

[15] *Ameritech DNAL Waiver Order*, paras. 11-13, *BOC DNAL Waiver Order*, para. 6 n. 12.

[16] *Ameritech DNAL Waiver Order*, paras. 11-13, *BOC DNAL Waiver Order*, para. 6; *citing* MTS and WATS Market Structure, CC Docket No. 78-72, and Transport Rate Structure and Pricing, CC Docket No. 91-213, 6 FCC Rcd 5341 (1991) (*Transport Rulemaking*).

[17] Pacific Bell Petition at 2-3.

[18] Nevada Bell Petition at 8.

[19] *Part 69 ONA Order*, 6 FCC Rcd at 4537, para. 76.

[20] *Withdrawn BSE Waiver Order*, para. 22.

[21] Pacific Bell Petition at 3.

[22] *See Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099-6100, paras. 31-33.

[23] Nevada Bell Petition at 8.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the petitions for waiver of Part 69 of the Commission's Rules, filed by Nevada Bell and Pacific Bell, to establish subelements in the transport rate element for their dedicated network access lines, ARE GRANTED, to the extent indicated above.

12. IT IS FURTHER ORDERED that the petitions for waiver of Part 69 of the Commission's Rules, filed by Nevada Bell and Pacific Bell, to establish subelements in the transport rate element for their interstate Private Branch Exchange Direct Inward Dialing BSAs, and their Private Branch Exchange Direct Outward Dial BSAs, ARE GRANTED, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal No. 609
Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 494 and 496
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1571

Open Network Architecture Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1992; Released: March 6, 1992

1. On December 27, 1991, the Common Carrier Bureau (Bureau) released the *Ameritech ONA Tariff Order*,[1] suspending the Open Network Architecture (ONA) tariffs of the Ameritech Operating Companies (Ameritech) for one day and initiating an investigation into the lawfulness of those tariffs. Following that Order, on January 31, 1992, the Bureau suspended the ONA tariffs of other Bell Operating Companies (BOCs) for one day and initiated an investigation into their lawfulness.[2]

2. These tariffs represent the BOCs' attempts to implement ONA policies adopted in the *Part 69 ONA Order*. In that Order, the Commission directed the BOCs to unbundle the optional and generally software-based features and functions from their existing feature group access arrangements.[3] These unbundled features and functions were to be called basic service elements (BSEs). BSEs were distinguished from the underlying switching and transmission services called basic serving arrangements (BSAs). The *Part 69 ONA Order* also adopted a flexible, cost-based approach to ONA pricing. BSAs are priced residually to satisfy the revenue neutrality standard.[4]

3. On January 31, 1992, the Bureau ordered four BOCs to tariff specific BSEs that were listed in their approved ONA plans, but had not previously been included in any tariff transmittals. The Bureau also ordered those BOCs to file tariffs for those BSEs not later than February 21, 1992, to become effective March 7, 1992.[5] These tariffs respond to the Bureau requirements established in that Order. No petitions have been filed against any of these tariffs.

4. To develop BSE rates, the BOCs have employed the Switching Cost Information System (SCIS), a computer model that simulates a central office switch and apportions its capacity and cost among the functions the switch provides. In the *ONA Investigation Order*, our preliminary, *in camera* review of the SCIS model and data revealed no substantial defects that would warrant rejecting the ONA tariffs. However, we also concluded that further investigation was necessary to assure that the rates: (based on SCIS are reasonable and in compliance with the ONA Orders.[6]

5. The rates before us now are also based on SCIS, and thus raise issues similar to those raised by the ONA tariffs reviewed in the *ONA Investigation Order*.[7] Accordingly, the transmittals will become effective on March 8, 1992, following a one-day suspension, subject to an accounting order to facilitate any refunds that later prove necessary. We will designate issues for this investigation in a later Order.

6. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), an investigation is instituted into the lawfulness of the tariff revisions referenced above, and any future tariff revisions modifying those referenced above, filed by the Ameritech Operating Companies, Bell Atlantic Telephone Companies, and Pacific Bell. We will designate issues in this investigation in a future Order.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in

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[1] Ameritech Operating Companies, Reveisions to Tariff F.C.C. No. 2, Open Network Architecture, 7 FCC Rcd 257 (Com.Car.Bur. 1991) (*Ameritech ONA Tariff Order*).

[2] Bell Atlantic Telephone Companies, *et. al.*, Open Network Architecture Tariffs, DA 92-128, released January 31, 1992 (*ONA Investigation Order*). The Bell Operating Companies are the Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

[3] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[4] *See Part 69 ONA Order*, 6 FCC Rcd at 4531-32, paras. 38-48.

[5] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Subelements for Open Network Architecture, Filing and Review of Open Network Architecture Plans, CC Docket Nos. 89-79, 88-2, DA 92-120, released January 31, 1992 (Com.Car.Bur.) (*BSE Withdrawal Waiver Order*), at para. 45. The Bureau granted the waiver requests of BellSouth, Southwestern Bell, and US West. *Id.* at paras. 40, 43-44. NYNEX has requested waiver of the February 21 tariff filing deadline for the three BSEs it was Ordered to tariff in the *BSE Withdrawal Waiver Order*, and Pacific Bell has requested a similar waiver for four of the 12 BSEs it was Ordered to tariff. The February 21 deadline is stayed for NYNEX and Pacific Bell pending the Bureau's decision on these waiver petitions.

[6] *ONA Investigation Order*, para. 9.

[7] Ameritech plans to establish extended superframe as a BSE, but does not plan to charge for it. We will also include Ameritech's extended superframe in our ONA investigation.

the Tariff Transmittals referenced above ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

8. IT IS FURTHER ORDERED that the Bell Operating Companies listed above SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this Order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-170.

9. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), the Bell Operating Companies listed above shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY — File No. BPH-880812MZ

MATTHEW WILLIAMS — File No. BPH-880816OC

For Construction Permit for a New FM Station on Channel 247C2 in Longview, Texas

Appearances

Donald E. Martin and *Spencer W. Weisbroth* on behalf of Capitol City Broadcasting Company and *Lawrence Bernstein* and *F. Joseph Brinig* on behalf of Matthew Williams.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: March 10, 1992; Released: March 17, 1992

1. Two applications, out of seven designated for a comparative hearing for FM Channel 247C2 in Longview Texas, remain to be considered on the following issues:

> 1. To determine whether Matthew Williams withheld information from the Commission, lacked candor, or misrepresented his interest in Blue Jay Productions, Inc. and the broadcast interests of Blue Jay Productions, Inc.
>
> 2. To determine whether Bruce Williams and/or Blue Jay Productions, Inc. is a real party in interest in Matthew Williams' application.
>
> 3. To determine, in light of the evidence adduced, whether Matthew Williams is qualified to be a Commission licensee.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on October 16, 1990. Tr. 1-15. Written testimony was exchanged by the applicants on May 17 and August 20, 1991. Hearing sessions were held on June 3, 1991 (Tr. 15-168) and September 4, 1991. Tr. 169-384. Proposed findings and conclusions were filed by the parties on July 30, 1991 and October 8, 1991 and replies were filed August 16 and October 29, 1991. The record was closed on June 3, 1991 (*Order*, FCC 91M-1847, released June 10, 1991) and reopened and closed on September 4, 1991. *Order*, FCC 91M-2756, released September 6, 1991.

FINDINGS OF FACT

Issue 1: Whether Matthew Williams withheld information from the Commission, lacked candor, or misrepresented his interest in Blue Jay Productions, Inc. and the broadcast interests of Blue Jay Productions, Inc.

3. As part of a declaration submitted with a petition for leave to amend, filed in May 1991, and an opposition to a petition to enlarge issues, filed in June 1991, Matthew Williams (hereafter Williams) informed the Commission that he should have reported in his application, filed August 16, 1988, that he is a Vice President, Secretary and Director of Blue Jay Productions, Inc. Williams Exh. 3, at 1 and App. I, at 1. Williams reported that Blue Jay is the licensee of KEES-AM, Gladewater, Texas and KYZS-AM, Tyler, Texas. Williams Exh. 3, at App. I, at 1. He also stated that his father, Bruce Williams, is president and 100 percent owner of the stations. *Id.* Williams explained that he had previously reported that he is the general manager at KEES-AM and that he would leave that position if he is granted the license for FM Channel 247C2, Longview, Texas. *Id.* Williams conceded in his written testimony that at his deposition in this proceeding, taken on April 29, 1991, he had repeatedly represented that he was not an officer of Blue Jay. Williams Exh. 3, at App. I, at 3. He concedes that he gave his testimony in the face of being shown documents filed with Texas and the Commission which identified him as an officer. *Id.*

4. Williams states that he signed a number of documents as Vice President of Blue Jay. Williams Exh. 3, at App. I, at 3. Williams has been a vice president, secretary and director of Blue Jay since early 1988. *Id.* While Williams signed Blue Jay corporate documents that listed him as an officer and director, he said, he did not pay attention to what he was signing; he did not read the documents with care. *Id.*, at 4. However, he admits that he told people he was vice president. *Id.*, at 5. But he did not consider himself "to actually be an officer in Blue Jay." *Id.* Williams represented that he believed that he had the title of vice president but that he did not consider himself to actually be an officer. *Id.*

5. Williams claims that aside from his position as general manager of KEES, he has "never had a position of management or control of any other communications entity." Williams Exh. 3, at App. I, at 2. Williams' business card lists the address and telephone number of KYZS, in addition to KEES. Capitol Exh. 22. Each station also had a network agreement which was signed by Williams. Capitol Exhs. 23-30.

6. Stephanie Sommer, a Washington, D.C. communications attorney, was hired by Blue Jay to complete Form 314 when KYZS was assigned to Blue Jay. Tr. 369, 370; Capitol Exh. 5. She testified that when she needed information about the transfer application she spoke with Matthew Williams. Tr. 371. She sent the draft to him for his review. Tr. 373. They spoke frequently by telephone. Tr. 375. Blue Jay represented on Form 314 that "An

application for a new FM station at Longview, Texas is on file for the applicant and is currently pending Commission review (FCC File No. 880816OC)." Capitol Exh. 5, at Exh. 1. Blue Jay was the applicant, Ms. Sommer believed. Tr. 378-79. The information about the Longview application was provided by Williams. Tr. 379. The final application, which Sommer prepared, was not sent to Bruce Williams. Tr. 380. Ms. Sommer did not recall any information she was provided by Bruce Williams and she did not remember ever talking to him about the application. Tr. 380. Matthew Williams was the only source of information for the assignment. Tr. 382.

7. Since April 1987, Williams has been identified as an officer and/or director of Blue Jay at least 50 times in documents filed with the FCC, the State of Texas and on contracts between Blue Jay and other entities. Capitol Exhs. 5-32. Williams has been identified as president of Blue Jay six times, vice president 26 times, secretary 11 times, director five times, and as the registered agent twice. Capitol Exhs. 5-32. Williams signed his name as an officer or director of Blue Jay on over 30 occasions, many of which were FCC certifications. Capitol Exhs. 5-32.

8. He certified the information on Form 314, which stated that Blue Jay was an applicant for the Longview, Texas channel, which is the subject of this proceeding. Capitol Exh. 5. He also certified that he is a Vice President of Blue Jay. *Id.* Williams said he did review the application before he signed it. Tr. 185. Williams maintains the application is inaccurate and he denies he told counsel that Blue Jay is the applicant for Longview. Williams Exh. 3, at 4. He said he did not know where the false information came from and he could not remember how he received the application to sign. Tr. 185.

9. Williams wrote to the Commission, on January 19, 1990, in his capacity as Vice President of Blue Jay, requesting that the Commission change KDOK's call letters to KYZS. Capitol Exh. 7. He said he did not prepare the letter but that it was prepared by a broadcaster who wanted to use the KDOK call letters. Tr. 197-98. Williams could not explain how the broadcaster obtained KDOK's stationery, and he did not know why the broadcaster thought Williams was a Vice President of Blue Jay. *Id.* Williams also received letters from the Commission addressed to him as Vice President of Blue Jay. Tr. 204. Williams maintains that although he was routinely identified as a vice president, he took no note of it. *Id.* He said he simply signed whatever he was asked to sign if it came from his father or his father's attorney; he would not look at the document and he did not know what he was signing. Tr. 206-07.

10. Williams also signed, as both a vice president and secretary of Blue Jay, documents which indicated that certain corporate meetings were held, when they were not. Tr. 230, 239. Capitol Exhs. 14, 15, 16. The documents which he signed indicated that he was elected as both an officer and director. *Id.*

11. Between September 1989 and March 1991, Williams signed seven program distribution contracts on behalf of Blue Jay for KYZS and KEES. Capitol Exhs. 23-27, 29-30. He signed six of them as president and one as the general manager. *Id.* The contract requires that a corporate officer or manager sign. *Id.* Williams said he signed as president to impress the stations' employees. Tr. 283-84. Williams never discouraged people from thinking that he was president and owner of Blue Jay. Tr. 290. He usually signed the programming agreements as president. Tr. 308. Bruce Williams, who owns Blue Jay, does not object to Williams holding himself out as the owner of the stations. Tr. 357.

12. On the bank signature card for Blue Jay, Williams is identified as a vice president. Capitol Exh. 32. Williams signed the card. *Id.* He signed, he said, even though he did not think he was vice president. Tr. 316. He said he did not think about it at the time. *Id.*

Issue 2: Whether Bruce Williams and/or Blue Jay Productions, Inc. is a real party in interest in Matthew Williams' application.

13. Matthew Williams, who is the applicant in this case, is employed by Blue Jay Productions, which is owned by Williams' father, Bruce Williams. Tr. 353. Although Williams lives in Texas, where he manages Blue Jay's broadcast stations, he obtained reasonable assurance from New Era Bank, which is located in New Jersey. Williams Exh. 3, at 5. Bruce Williams is an investor and stockholder in New Era Bank; he has a mortgage with the bank; he was one of the first depositors of the bank; he has known Mr. Sisler, the loan officer who issued the loan letter, for 25-30 years; the New Era Bank's credit card program advertises on Bruce Williams' syndicated radio show; and Bruce Williams is spokesperson for New Era Bank and receives a percentage of the profits from the credit card business. Tr. 337-41. Williams Exh. 4, at 5.

14. Matthew Williams has always been involved in businesses that his father owned or they owned together. In 1980, when Williams graduated from college, he began a business with his father called Jersey Jalopies. Tr. 347. They were both stockholders in the corporation, according to Bruce Williams. Tr. 347. Matthew Williams said that he was not an owner or officer of Jersey Jalopies; he maintained he only worked for his father and ran the business, which his father financed. Tr. 260, 348.

15. Next Williams worked at Media Personalities, another business his father owned. Tr. 348-49. From there, he went to Texas to work at Blue Jay's station KEES-AM. Bruce Williams said he purchased the station only because Matthew Williams was interested in managing the station. Tr. 354. Bruce Williams said that KYZS and KEES would be sold if Matthew Williams would not manage them. Tr. 335. Matthew Williams could not remember whether he or his father suggested purchasing KEES. Tr. 268. But Matthew Williams helped make the decision and determined where the station would be located. Tr. 267-68, 269. The reason Williams could not remember, he explained, was because he and his father have a "staccato" relationship in which they each raise ideas repeatedly. Tr. 268. Bruce Williams is and has been in the radio business, but as talent. Tr. 268-69. However, when the Williamses owned Jersey Jalopies, they bought a lot of radio time and began to learn the business side of radio. Tr. 269. It was Matthew Williams who suggested that Blue Jay buy KDOK. Tr. 320. Bruce Williams simply followed Matthew Williams' suggestion. Tr. 358.

16. Matthew and Bruce Williams operate and own other businesses together; Matthew Williams purchases Christmas trees for a tree selling business Bruce Williams operates; he owns 25 percent of a barber shop with his father; and he owns stock in a flower shop also owned with his father. Tr. 362, 365. Matthew Williams has borrowed $50,000 from Bruce Williams and he has used $30,000 of it to pursue this application. Tr. 317, 365-66.

There is no note and Bruce Williams' view is that Matthew Williams should pay him "when he can." Tr. 318, 366.

Issue 4: Which of the proposals would, on a comparative basis, best serve the public interest

Capitol

Integration of ownership into management

17. Capitol is a general partnership. Capitol Exh. 1, at 1. Cal Varner and Ronald Patterson are equal partners. Capitol Exh. 1, at 1; Capitol Exh. 2, at 1. Capitol Exh. 3, at 1. Varner proposes to work full time, 40 hours per week, as the general manager. Capitol Exh. 2, at 1. He will hire and supervise all department heads and determine and implement all policies. *Id.* He will sever all current business and employment. Capitol Exh. 2, at 2. Patterson proposes to work full time, 40 hours per week, as the business manager. Capitol Exh. 3, at 1. Patterson will hire and supervise the sales staff and he will determine the station's business, advertising and sales policies. Capitol Exh. 3, at 1. He will end his current business and employment that would interfere with his promise. Capitol Exh. 3, at 2.

Enhancement qualities

18. Both Varner and Patterson will move to Longview, Texas. Capitol Exh. 3, at 2; Capitol Exh. 2, at 2. Varner and Patterson are African Americans. Capitol Exh. 2, at 1; Capitol Exh. 3, at 1.

Auxiliary power

19. Capitol proposes to install auxiliary power at its transmitter and studio locations. Capitol Exh. 4.

Diversification of ownership of mass media

20. Capitol and its partners have no mass media interests. Capitol Exh. 1, at 1, Exh. 2, at 2, Exh. 3, at 2.

Matthew Williams

Integration of ownership into management

21. Matthew Williams is an individual applicant. Williams Exh. 1, at 1. He proposes to work full time, 40 hours per week, as the general manager of the station. Williams Exh. 1, at 2. He will be in charge of all aspects of station operation and control, including finance, personnel and programming. *Id.* He will end his current employment. *Id.*

Enhancement qualities

22. Williams has lived in Gladewater, Texas since June 1988 and during the preceding four months in Longview, Texas. Gladewater is within the city grade contour of the proposed station. Williams Exh. 1, at 1. From March 1988 to the present, Williams has belonged to the Longview chapter of the American Business Club and the Longview, Kilgore, and Gladewater Chambers of Commerce. Williams Exh. 1, at 3. From May 1988, Williams has been a member of the Longview Independent School District Advisory Council. Williams Exh. 1, at 3. After his application was filed he became a member of the Longview Free Enterprise Committee and Pinetree Partners Community Board. *Id.* Since filing his application, he has become a member of a dozen additional committees and organizations. Williams Exh. 1, at 4.

23. Williams became the general manager of KEES-AM in March 1988. Williams Exh. 1, at 2. From September 1986 to September 1987, Williams purchased two hours of time weekly on WFLA-FM, Tampa, Florida and served as the on-air personality for the program. *Id.*, at 2-3.

Auxiliary power

24. Williams will install auxiliary power facilities at his transmitter and studio locations. Williams Exh. 1, at 5.

Diversification of ownership of mass media

25. Williams is employed by Blue Jay Productions, Inc. Blue Jay operates KEES(AM), Gladewater, Texas and KYZS, Tyler, Texas. Blue Jay's stock is owned by Bruce Williams, Matthew Williams' father. Williams is vice president, director, and secretary of Blue Jay. Williams Exh. 1, at 1. Bruce Williams and Matthew Williams have promised to divest their interest in KEES. Williams Exh. 1, at 1. KYZS is currently operated as a satellite of KEES. *Id.*, at 2. In 1990, Blue Jay agreed to divest KEES. Williams Exh. 2, at 3.

CONCLUSIONS

Issue 1: Williams lacked candor about his interest in the broadcast licensee, Blue Jay Productions.

26. Williams now concedes that he did not reveal the full extent of his association with Blue Jay Productions, Inc., the licensee of KEES-AM, Gladewater, Texas and KYZS-AM, Tyler, Texas in his application and his statements under oath at his deposition. Williams reported in his application that he is the manager of the stations and that he intends to resign if he receives a grant. Blue Jay, which is owned by Williams' father, Bruce Williams, has made a promise to divest KEES but it did not promise, until Williams' additional relationship to Blue Jay arose, to divest KYZS. Williams now admits that he is Vice President, Secretary and a director of Blue Jay. During Williams' deposition, in the face of documents which established his multiple positions in Blue Jay, Williams denied he was actually an officer or director of Blue Jay.

27. Williams has repeatedly acted as an official of Blue Jay. Documents in the record identify Williams over 50 times as an officer and/or director in filings made to the Commission, the State of Texas, and on contracts between Blue Jay and other entities. Williams, the record indicates, signed his name as an officer or director of Blue Jay on over 30 occasions. He frequently certified to the Commission his official role as an officer and director.

28. Williams claims he did not pay attention to what he was signing and he did not read the documents with care. Williams' response to the questions raised about his role demonstrate that he is not someone the Commission can rely on to act honestly and exhibit good faith as a licensee. Frequently, Williams signed his name directly above the title he holds in Blue Jay and the subject matter of many of the documents he certified and signed dealt directly with who owns and directs the affairs of Blue Jay. It is highly improbable that he was unaware of his role as an officer and director of Blue Jay when he

completed the Longview application and when he was questioned at his deposition. Williams attacks the argument of improbability by explaining that he did represent himself as an officer and owner of Blue Jay to advertisers and station employees. In fact, he said, he believed he had the title of vice president but that it did not carry any legal or official meaning. That claim was not his full reason, however. He said that he wanted station employees to believe he owned the station and that he was an officer. Williams said that he represented himself as the owner and president of Blue Jay on agreements with program suppliers because station employees would see the agreements and he wanted them to think that he was the owner of KEES/KYZS. In the case of these agreements, he actually wrote in on them that he was president of the licensee. He also signed the stations' bank signature card as vice president even though he said he did not believe he was vice president. If Williams believed it was appropriate to be dishonest about his interest with employees and advertisers, there is no reason to assume that he did not think the same dishonesty was acceptable when he made similar representations to the Commission and state authorities.

29. Moreover, even when all objective evidence points to Williams as the source of the information on Commission filings, he has denied that he was aware of what was being represented about his role. When Blue Jay requested that the Commission assign the license for KYZS to it, it was stated that Williams was vice president. Capitol Exh. 5 at 5. According to the counsel who prepared the assignment application for Blue Jay, Williams was the source of the information provided on the form. When Blue Jay requested that the Commission change the call letters from KDOK to KYZS, the request was written on the station's stationery and Williams signed as vice president. Williams claims that he did not read the letter and that it was prepared for him by another broadcaster who wanted the call letters being abandoned. Williams could not explain where a third party writing on Blue Jay's stationery learned that he was a vice president.

30. Who directs the affairs of a licensee is material to the regulatory process. Williams, by his admission, repeatedly attempted to make people believe he was an officer of Blue Jay, when he claims that he thought he was not. He was perfectly willing to make similar representations to the Commission. Assuming he knew the truth, that he is an officer and director of Blue Jay, he was unwilling to reveal his ties to Blue Jay in this proceeding because of its obvious comparative impact. And because of the seriousness of that lie, he said that, when the representation that he was an officer was made to the Commission, he did not know it had been done, although almost always he signed the document making the representation. Williams has failed to demonstrate that he is reliable and trustworthy. He is not qualified to become a licensee.

Issue 2: Bruce Williams is a real party in interest in Williams' application.

31. It is undisputed that Bruce Williams owns all the stock in Blue Jay Productions, Inc., which is the licensee of KEES/KYZS. His son, Matthew Williams, who is an individual applicant in this proceeding, manages the stations. Williams lives in Gladewater, Texas where KEES is located. Nevertheless, contrary to all past business arrangments between the Williamses, when the Longview, Texas FM channel became available, Williams applied alone. Williams has also said that he will end his employment at KEES. During Williams' adult working life he has always worked at businesses owned primarily by his father. Williams' own account of his past business arrangements with his father has not been accurate. Williams has denied that he has ever had an ownership interest in the businesses operated with or by his father but Bruce Williams testified that that has not been the case. He stated that Matthew Williams owned an interest in the first business they operated together, Jersey Jalopies, and that Matthew Williams continues to have an ownership interest in other businesses owned by his father. Of the three major businesses in which Williams has been involved with his father, Williams has always managed them on a day to day basis. In each case, however, his father, who has financed the businesses, retained a controlling interest.

32. The application for the Longview channel varies from the normal business practice which Williams and his father have always followed in that Williams' father does not directly own an interest in the Longview proposal. Bruce Williams has, however, lent Williams the money needed to pursue the proposal without a note or any repayment requirements and a bank in New Jersey, New Era Bank, in which Bruce Williams has an ownership interest, deposits, and a business relationship has provided reasonable assurance of a loan to finance construction and operation of the Longview, Texas station. The record shows that Williams has relied, as he has before, on his father for financial backing. It is equally true, as Williams concedes, that the ideas for the businesses have resulted from a collaborative process. He explained that because he and his father talk together so often it is not possible to determine who initiates an idea. For example, the record shows that it may well have been Bruce Williams' idea to enter the broadcast business and purchase KEES.

33. There is no evidence that Williams would not operate the Longview station, since he appears to operate KEES/KYZS on a day to day basis. But there appears to have been a belief at one point that Bruce Williams would be an owner of the Longview facility. On the Form 314 to assign KYZS to Blue Jay Productions, that was filed with the Commission after Williams filed the Longview application, Blue Jay represented that it was the applicant for Longview. The evidence indicates that that representation probably exhibits Williams' view at that time. Counsel for Blue Jay, in the assignment proceeding, indicated that the source of the statement was Matthew Williams. She maintains that she had no other person or records she relied on to complete the form. The form was signed by Williams. Williams has not explained how that statement could have escaped his notice. The application when completed was sent to him. Williams has not shown that he will operate the Longview station any differently than he has operated other businesses. There is ample reason for Williams to assert that Bruce Williams will not be an owner of the Longview station. Williams' integration claim would be too weak to succeed if his father is a party. The record shows that Bruce Williams has performed the same role in this application as he has in all other businesses which the Williamses have operated together. Williams has not shown that any protective measures have been taken to separate him from his father's influence and participation. And, thus far, his father has

participated. Bruce Williams has provided financing with no strings attached and, in an unguarded moment, Williams even told the Commission that this station would be owned by Blue Jay. Applicants are not free to craft their applications to fit the comparative criteria when that is not their true intention. The record indicates that Williams is not independently pursuing the Longview facility; instead the facts show that Bruce Williams is as much a party to this venture as he has been to every other one pursued by Williams. Williams failed to identify to the Commission the true nature of his proposal.

Issue 4: Comparison of the applicants

34. Because Williams has been found to be unreliable and untrustworthy in his representations to the Commission, Capitol is the only qualified applicant. No comparison is necessary. A grant of Capitol's application will serve the public interest.

ACCORDINGLY, IT IS ORDERED that the application of Matthew Williams (File No. BPH-880816OC) IS DENIED and the application of Ronald E. Patterson & Cal E. Varner d/b/a Capitol City Broadcasting Company (File No. BPH-880812MZ) for a construction permit for a new FM station on Channel 247C2 in Longview, Texas IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-373

In the Matter of

Pilgrim Telephone, Inc.

ORDER

Adopted: March 6, 1992; Released: March 6, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, we issued an order in the captioned proceeding directing Pilgrim Telephone, Inc. (Pilgrim) to demonstrate that its rates are just and reasonable, or reduce its rates to a just and reasonable level, and to announce, at the beginning of each call that it handles, that its rates are available on request.[1] We issued this order pursuant to our authority to review the rates of interstate providers of operator services (OSPs) under the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).[2]

2. On January 28, 1992, Pilgrim filed a pleading requesting that we terminate the captioned proceeding. Pilgrim argues that it is not an OSP and thus is not subject to our jurisdiction under TOCSIA. In order to have sufficient time to address the issues raised by Pilgrim's pleading, we previously extended the deadline by which Pilgrim must comply with our Order through March 5, 1992.[3] We now further extend the deadline by which Pilgrim must comply with our Order from March 5, 1992 to March 20, 1992.[4]

3. Accordingly, IT IS ORDERED that the effective date of the requirements that Pilgrim Telephone, Inc., demonstrate that its rates are just and reasonable, and begin announcing, at the beginning of each call that it handles, that its rates are available on request IS EXTENDED until March 20, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 91-1608, released Dec. 23, 1991 (Com.Car.Bur.).

[2] TOCSIA is codified as Section 226 of the Communications Act, 47 U.S.C. § 226.

[3] Pilgrim Telephone Inc., CC Docket No. 91-373, DA 92-163, released Feb. 6, 1992 (Com.Car.Bur.); Pilgrim Telephone Inc., CC Docket No. 91-373, DA 92-209, released Feb. 20, 1992 (Com.Car.Bur.).

[4] We will address the merits of Pilgrim's petition at a later date. This further extension is necessary to enable us to complete our review of further information submitted by Pilgrim. *See* Supplemental Response to Show Cause Order, filed Mar. 4, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

AMSC SUBSIDIARY CORPORATION	File Nos. 15/16-DSS-MP-91
CONSTELLATION COMMUNICATIONS, INC.	File Nos. 17-DSS-P-91(48) CSS-91-013
ELLIPSAT CORPORATION	File No. 18-DSS-P-91(18)
LORAL QUALCOMM SATELLITE SERVICES, INC.	File Nos. 19-DSS-P-91(48) CSS-91-104
TRW, INC.	File Nos. 20-DSS-P-91(12) CSS-91-015

For Authority to Construct RDSS and Mobile Satellite Systems for Operation in the RDSS Bands

ORDER

Adopted: March 11, 1992; Released: March 17, 1992

By the Chief, Domestic Facilities Division:

1. AMSC Subsidiary Corporation (AMSC) has filed a Petition for Extension of Time in which to file responses in the proceedings referenced above. The proceedings concern applications proposing satellite systems that would provide a variety of voice mobile satellite services in the frequency bands currently allocated to the radiodetermination satellite service, *i.e.*, 1610-1626.5 MHz/2483.5-2500 MHz. They were filed in response to a cut-off notice inviting applications to be considered concurrently with applications that previously had been filed by Ellipsat Corporation and Motorola Satellite Communications, Inc. (Motorola). *See* Public Notice, Report No. DS-1068 (April 1, 1991). The new applications were placed on public notice and a pleading cycle was established. *See* Public Notice, Report No. DS-1134 (October 24, 1991). Comments and petitions were filed on December 18, 1991. Reply comments and oppositions were filed on January 31, 1992.

2. In its petition, AMSC requests that the date for responses be extended from March 13, 1992 to March 27, 1992. AMSC represents that Counsel for Constellation Communications, Inc. and Loral Qualcomm Satellite Services, Inc. have indicated their support for this petition. In addition, AMSC states that Counsel for Ellipsat, Motorola, and TRW, Inc. do not object to an extension of time.

3. Citing the complex and extensive technical appendices and arguments contained in the January pleadings, as well as the number of technical personnel attending the 1992 World Administrative Radio Conference (WARC), AMSC states that an extension of time to file responses will allow for a complete analysis of the numerous technical issues. In addition, AMSC states that the extension would enable parties to address the results of the WARC in their filings.

4. The public interest would be served by allowing additional time to analyze the complex technical issues presented in this proceeding, as well as the results of the WARC. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that AMSC Subsidiary Corporation's Petition for an Extension of Time IS GRANTED. The date for filing responses is extended from March 13, 1992 to March 27, 1992.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-48

In the Matter of

Amendment of Section 73.202(b), RM-7922
Table of Allotments,
FM Broadcast Stations.
(Bagdad, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1992; Released: March 17, 1992

Comment Date: May 8, 1992
Reply Comment Date: May 26, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed by Chris Sarros ("petitioner") requesting the allotment of Channel 280A to Bagdad, Arizona, as its first local aural transmission service. Petitioner stated an intention to apply for the channel, if allotted.

2. Petitioner did not submit any information regarding Bagdad's status as a community. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL,* 5 FCC Rcd 3774 (1990); *Hannibal, OH,* 5 FCC Rcd 3315 (1990); and *Statenville, GA,* 5 FCC Rcd 2685 (1990). Although Bagdad is attributed with a population of 1,858 persons in the 1990 U.S. Census, and is listed therein as a Census Designated Place ("CDP"), the Census listing is not absolute for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a post office, library, schools, shopping centers, churches, a newspaper, and social or civic organizations. *See, e.g., Searles Valley, CA,* 3 FCC Rcd. 5221 (1988); *see also, Naples, FL,* 41 RR 2d 1549 (1977). Therefore, petitioner is requested to submit information regarding Bagdad to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that locality.

3. A staff review of the proposal reveals that Channel 280A can be allotted to Bagdad consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules without the imposition of a site restriction.[1] However, because Bagdad is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the Commission must seek concurrence of the Mexican government in the proposal.

4. We believe the public interest would be served by proposing the allotment of Channel 280A to Bagdad, Arizona, in the event it is ultimately found to qualify as a community for allotment purposes, since an interest has been expressed in providing a first local aural transmission service at that location. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Bagdad, as follows:

	Channel No.	
City	Present	Proposed
Bagdad, Arizona	--	280A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 8, 1992,** and reply comments on or before **May 26, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Chris Sarros
3815 Northfield Avenue
Kingman, AZ 86401

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and

[1] Coordinates used for Channel 280A at Bagdad are 34-34-52 and 113-12-14.

such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-49

In the Matter of

Amendment of Section 73.202(b), RM-7924
Table of Allotments,
FM Broadcast Stations.
(Greenfield, Huntsville and
Seligman, Missouri)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 6, 1992; Released: March 17, 1992

Comment Date: May 8, 1992
Reply Comment Date: May 26, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KJEM FM, A Limited Partnership ("petitioner") requesting the substitution of Channel 227C1 for Channel 227C2 at Seligman, Missouri.[1] Petitioner also requests modification of its license for Station KESE, Channel 227C2, to specify operation on the higher class channel. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Seligman and the surrounding area with expanded service. Petitioner notes that Channel 227C1 can be allotted to Seligman, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 299A is substituted for Channel 228A, Greenfield, Missouri, and Channel 258A is substituted for Channel 225A, Huntsville, Missouri.[2]

3. Station KXBR operates on Channel 228A, Greenfield, Missouri, and Station KFAY-FM operates on Channel 225A, Huntsville, Missouri. The proposed substitution at Greenfield and Huntsville can be accomplished in compliance with the minimum distance separation requirements of the Commission's Rules at the current licensed sites for station KXBR and KFAY-FM.[3] We shall also propose to modify the license for Station KESE, Channel 227C2, to specify operation on Channel 227C1 in accordance with Section 1.420(g) of the Commission's Rules without entertaining competing expressions of interest in the use of Channel 227C1 at Seligman, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it will reimburse the affected station for costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station KXBR, Greenfield, and Station KFAY-FM, Huntsville, for the reasonable costs in changing frequency.

5. We believe the public interest would be served by proposing the allocation of Channel 227C1 to Seligman, Missouri, since it could provide the community with expanded FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Greenfield, Missouri	228A	299A
Huntsville, Missouri	225A	258A
Seligman, Missouri	227C2	227C1

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, KXBR, Inc., the licensee of Station KXBR, Greenfield, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify opoeration on Channel 299A in lieu of Channel 228A and Demaree Media, Inc., the licensee of Station KFAY-FM, Huntsville, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 258A in lieu of Channel 225A.

7. Pursuant to Section 1.87 of the Commission's Rules, KXBR, Inc., and/or Demaree Media, Inc., may not later than **May 8, 1992,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KXBR, Inc., and/or Demaree Media, Inc., to furnish additional information. If KXBR, Inc., and/or Demaree Media, Inc., raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, KXBR, Inc., and/or Demaree Media, Inc., will be deemed to have consented

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 227C1, Seligman, are 36-28-03 and 94-10-25.

[3] The coordinates for Channel 299A, Greenfield, are 37-23-10 and 93-53-16. The coordinates for Channel 258A, Huntsville, are 36-05-35 and 93-36-16.

to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

KXBR, Inc.
Station KXBR
19 East 200 South
Salt Lake City,
Utah 84111

Demaree Media, Inc.
Station KFAY-FM
P.O. Box 878
Fayetteville,
Arkansas 72712

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **May 8, 1992,** and reply comments on or before **May 26, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Elvis Moody
KJEM FM, A Limited
Partnership
216 North Main Street
Bentonville, Arkansas 72712

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments,

reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

BHC ASSOCIATES,
LIMITED PARTNERSHIP
(Assignor)

and File No. BAPCT-891113KG

BIG HORN
COMMUNICATIONS, INC.
(Assignee)

For Consent to Assign the
Construction Permit for
Station KPQD-TV, Channel 6,
Billings, Montana

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1992; Released: March 12, 1992

By the Chief, Video Services Division:

INTRODUCTION

1. On May 1, 1991, the Chief, Video Services Division issued a Memorandum Opinion and Order (the "MO&O") denying a petition by Comanche Enterprises ("Comanche") to deny an application to transfer control of the construction permit for station WPQD-TV, Channel 6, Billings, Montana, to Big Horn Communications, Inc. ("Big Horn"). Currently, the Chief, Video Services Division of the Mass Media Bureau has under consideration (1) Comanche's Petition for Reconsideration of the denial of its Petition to Deny, (2) Big Horn's Opposition to the Petition for Reconsideration, and (3) supplementary pleadings filed by both parties. This Order denies Comanche's Petition for Reconsideration.

BACKGROUND

2. In its Petition to Deny, Comanche raised several issues regarding Big Horn's qualifications to be the assignee of the construction permit for Channel 6. First, Comanche objected to the programming at Big Horn's Hardin station as being nonresponsive to community issues and as falling short of the station's original programming proposals. We found no basis for that assertion. Second, Comanche argued that Big Horn had attempted to harass Comanche in two proceedings before the Commission and implied that we had reprimanded Big Horn in two other proceedings involving issues of misrepresentation. We found that Big Horn had done nothing more than exercise its statutory right to take part in Commission actions and that Big Horn had not in fact been involved in misrepresentation proceedings. Third, Comanche alleged that Big Horn had misrepresented matters in its application, failing in particular to report litigation pending against the company; but we concluded that this failure was at worst an error in judgment on the part of the company president and no indicator of misrepresentation. Fourth, Comanche argued that Big Horn and not BHC was the real party in interest behind the application for the Channel 6 construction permit from the beginning, but we concluded that the Petitioner had offered only speculation rather than facts in support of its allegation. Finally, Comanche asserted that the grant of the assignment to Big Horn would cause Station KOUS-TV, Channel 4, Hardin, Montana, to lose its network affiliation and eventually disappear, to the detriment of the public interest. Once again, we found that this argument was entirely speculative.

3. On reconsideration, the petitioner first alleges that the staff committed procedural error in our previous opinion by considering a late-filed consolidated opposition to its petition to deny. Comanche's petition to deny was filed on January 4, 1990, and Big Horn's opposition was due on January 14, 1990. However, on January 12, 1990, Big Horn filed a Motion for Extension of Time noting that it had just received Comanche's petition on the previous day, January 11, 1990. Big Horn requested a two-week extension of time to gather the material required to file its opposition. Big Horn filed its opposition on February 2, 1990, over Comanche's objection. While Comanche's objection to the late-filed pleading was not addressed in our previous decision, we are not persuaded that this omission requires modification of our opinion. No showing has been made that the two-week extension allowed in any way caused Comanche to be prejudiced or to sustain any hardships. Comanche had ample time to submit any reply or any supplemental information it believed material to the issues under consideration. The Commission has broad discretion with regard to its own filing requirements and regularly extends filing dates. This is particularly so where no significant prejudice results to the parties or to the public. In exercising its responsibilities to make decisions benefiting the public interest, the Commission may utilize broad discretion and flexibility in considering all information in the record. Since the petitioner has not demonstrated the manner in which it was prejudiced by our action, no further consideration of this issue is merited. We will now consider Comanche's substantive arguments.

DISCUSSION

4. It is well established that reconsideration will not be granted merely for the purpose of rearguing matters fully evaluated and discussed by the Commission in its previous action. *See WWIZ, Inc.*, 37 F.C.C. 2d 685, 686, *aff'd sub nom. Lorain Journal Co. v. F.C.C.*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *Florida Gulfcoast Broadcasters, Inc.*, 4 R.R.2d 1 (1964). We have reviewed Comanche's petition and conclude that the petitioner has failed to demonstrate either material error or omissions in our previous decision. The bulk of the contentions raised in the petition are repetitive or merely cumulative of those exhaustively analyzed and considered in our decision. Mere disagreement with the result is not a basis for alteration of the original decision. However, we note that Comanche does raise one new matter, namely that BHC may have misstated the cost of obtaining the

construction permit for which Big Horn later agreed to pay $200,000. While it is not clear why this matter could not have been raised previously as required by Section 1.106 of the Commission's Rules, we will consider the matter in the interest of thoroughness.

5. The stated cost of obtaining the permit as set forth in the application for assignment was $201,749.56. Comanche offers a letter filed in the Office of Register of Wills of Montgomery County, Maryland, from Jim Swain, a CPA retained by the attorney for the estate of Daniel W. Coon, one of the assignors, setting the "cost" of the construction permit at $70,000. This disparity, Comanche contends, indicates that BHC violated the provisions of Section 73.3597 (c)(2) of the Commission's rules, which prohibits the sale of a construction permit for a consideration greater than the amount expended for obtaining the permit and placing the station in operation. In its Response, BHC offers declarations from a BHC principal, Mr. Curtis, from BHC's attorney, and from Mr. Swain himself, all of whom reaffirm the $201,749.56 cost entered in the original Application. Mr. Swain explains that the "cost" listed in his letter represents the tax basis of the asset for Mr. Coon's estate, not the total amount expended by BHC in obtaining its construction permit.

6. Comanche's only response to Mr. Swain's explanation is that, according to certain IRS guidelines for small businesses, it would have been impossible for BHC to reduce its tax basis for the permit from $200,000 to $70,000 through amortization. However, the petitioner has not provided any information to refute the specific items listed as expenses in the assignment application.

7. The provisions of Section 73.3597 are straightforward: they describe the permissible payment to a transferor or assignor of a construction permit only in terms of that party's out-of-pocket expenses incurred in obtaining the permit and placing the station in operation. Whether or not the permit could be assigned a value within some framework beyond our regulations, such as that offered by the Internal Revenue Code, is irrelevant to our consideration of the permissible costs under the rule.

8. Based upon the above, we find no basis for modification of our previous decision.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Comanche Enterprises IS DENIED, and our previous decision is HEREBY AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 9, 1992

CHAIRMAN SIKES NAMES NEW MEMBERS TO ADVANCED TELEVISION SERVICE ADVISORY COMMITTEE

Federal Communications Commission Chairman Alfred C. Sikes has announced his appointment of four new members to the FCC Advisory Committee on Advanced Television Service (Advisory Committee). William Connolly has replaced Neal Vander Dussen; Martin S. Davis has replaced Melvin W. Harris; Craig I. Fields has replaced James T. Lynagh; and Jerry K. Pearlman has replaced Robert Hansen. Additionally, Chairman Sikes has named the following Ex Officio members of the Advisory Committee: George Vradenburg III, Joseph Donahue, Robert Graves, Keiichi Kubota, Jae S. Lim, and Robert Rast. A current list of the names and addresses of the Advisory Committee members is attached.

For further information contact William H. Hassinger, Mass Media Bureau (202) 632-6460, or Bruce Franca, Office of Engineering and Technology (202) 632-7060.

FEDERAL COMMUNICATIONS COMMISSION

ADVISORY COMMITTEE ON

ADVANCED TELEVISION SERVICE

MEMBERS

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-502

In re Applications of

MICHELLE ELAINE HULSE, ET AL.	File No. BPH-890526MG
BEN L. UMBERGER	File No. BPH-890530MI
GEYER BROADCASTING CO., INC.	File No. BPH-890530MJ

For Construction Permit for a
New FM Station on Channel 228A.
Chandler, Indiana

Appearances

Russell C. Powell, on behalf of Michelle Elaine Hulse, Et Al.; *Stephen C. Simpson*, on behalf of Ben L. Umberger; *William P. Berton*, on behalf of Geyer Broadcasting Co., Inc.; and *Gary Schonman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 12, 1992; Released: March 18, 1992

Preliminary Statement

1. This is a multi-party proceeding for authority to construct a new FM station on channel 228A at Chandler, Indiana. The present list of applicants is: Michelle E. Hulse, William Horn, Janet Metzger and Brent Wookey, G.P. (HHM&W), Ben L. Umberger (Umberger) and Geyer Broadcasting Co., Inc. (Geyer).

2. The applications were designated for hearing by the Chief, Audio Services Division, in *Hearing Designation Order*, DA 90-1451, released November 15, 1990 (HDO). The *HDO* specified the following issues for hearing:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by each of the applicants would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. The air hazard issues were resolved in favor of Umberger, HHM&W and Geyer in three successive *Orders*: FCC 91M-716, released February 22, 1991; FCC 91M-836, released March 5, 1991 and FCC 91M-983, released March 18, 1991, respectively.

4. A prehearing conference was held on January 29, 1991. The hearing session was held on May 7, 1991 and the record was closed on that date. *Order*, FCC 91M-1598, released May 9, 1991. Findings of Fact and Conclusions were filed July 22, 1991; Replies were filed August 5, 1991.

Findings of Fact

Hulse, Horn, Metzger and Wookey

Structure of the Applicant

5. HHM&W is a general partnership consisting of four partners. The equity shares of each are as follows: Michelle Hulse - 85%; William Horn - 5%; Janet Metzger - 5%; Brent Wookey - 5%. HHM&W Ex. 1. Ms. Hulse has known and been friends with her partners for more than ten years each. Tr. 58-59, 62-63, 152, 171. The partnership agreement (Umberger Ex. 4) was put into writing in December of 1990 and memorialized the fundamental terms (*e.g.*, equity percentages, obligations of partners to provide or not provide funding) agreed upon by the partners prior to the filing of the application. Tr. 65-70, 154, 162, 173-175, 183. Ms. Hulse will contribute all the funds necessary for construction and operation of the station. Tr. 54, 93. The remaining partners have received partnership shares in return for their promise to work for the station. Umber Ex. 4; Tr. 54-55.[1]

6. *Ms. Hulse* will be integrated part-time (30 hours per week) into the operation and management of HHM&W's proposed station. HHM&W Ex. 2, p. 1; Tr. 84. She will serve as the station's General Manager. As such, Ms. Hulse will have ultimate responsibility for and authority over all aspects of station operation, including the hiring and firing of employees and the monitoring and supervision of the station's financial affairs. HHM&W Ex. 2, p. 1. She will exercise overall supervision over the station and the sales and programming managers (Messrs. Horn and Wookey, respectively) will report to her. *Id.*; Tr. 85-91.

7. Ms. Hulse received a B.A. degree from the University of Southern Indiana in 1976 and an M.A. from the University of Evansville in 1979. HHM&W Ex. 2, p. 1. She is only three hours short of the credit requirements for an M.B.A. Tr. 85.

8. Ms. Hulse intends to continue her 15-year employment as a seventh and eighth grade computer literacy teacher. HHM&W Ex. 2, p. 1; Tr. 38. Ms. Hulse is not married and has no children. Tr. 141. Her contract requires that she work 7 hours and 45 minutes per day, (38 hours and 45 minutes per week) 182 days per year. Umberger Ex. 2, p. 1; Tr. 38-40. Ms. Hulse has no other preparation or required duties (including parent-teacher conferences) that she must perform outside the 38 hour and 45 minute weekly commitment referenced above. Tr. 38-41, 141. Ms. Hulse's school day (when in session) runs from 7:15 AM until 3 PM. Tr. 39. When school is in session (i.e., not on summer or other vacation break), it is her intention to work at the station on weekdays from 3:15 until 8:30 PM, and complete the balance of her commitment on the weekend. Tr. 84-85. Hulse will be at

the station well before the end of the normal working day and thus will have "overlap" between her hours and those of her staff. Tr. 87-88. Ms. Hulse's teaching job is only a few miles from the town of Chandler, where the station is proposed to be located. Tr. 43. Her home is four miles (ten minutes) from Chandler. She has a three-month summer vacation and will not have to divide her time during those months. Tr. 141.

9. Hulse intends to give up all of her civic or other activities in order to effectuate the proposal she had made herein. HHM&W Ex. 2, p. 2. Ms. Hulse has no other activities or business commitments that would conflict with the integration pledge she has made in this proceeding. Tr. 141.

10. Ms. Hulse is a 37 year old female resident of Evansville, Indiana. HHM&W Ex. 2, p. 1. She has lived within the service area of the partnership's proposed Chandler FM station since 1957. HHM&W Ex. 2, p. 1; Tr. 29-30. She intends to remain at her current residence within the service area if HHM&W's application is granted. *Id.*

11. Ms. Hulse has engaged in significant civic activities in the proposed station's service area. From 1976 to the present, she has been an adult volunteer for sports events in the Warrick County Public Schools, handling tasks such as the collection of gate receipts, working in concession stands and chaperoning students. HHM&W Ex. 2, p. 2. From 1985 to the present, Ms. Hulse has volunteered to solicit contributions to the American Heart Association. *Id.*; Tr. 49. From 1980 to the present, she has convassed door-to-door, distributed flyers and worked at phone banks for the Vanderburgh and/or Warrick County Democratic Parties. *Id.*; Tr. 47, 49. She acted as volunteer Speech Coach and Advisor at Boonville High School from 1976 to 1979 and in the same capacity at Castle Junior High School from 1985 to the present. HHM&W Ex. 2 at p. 2. Ms. Hulse served as Treasurer of the Warrick County Teachers Association from 1983 to 1989 and on its Executive Committee from 1989 to the present. *Id.* She has been involved with the Indiana State Teachers Association for fifteen years (Tr. 43) and has been elected a member of its Board of Directors from 1988 to the present. *Id.*; Tr. 44. Her responsibilities with the Warrick County and Indiana State Teachers Association have been strictly volunteer and neither has been required as conditions of her employment. Tr. 44, 51-52.

12. *William Horn* is a general partner in HHM&W and proposes to work on a full-time basis (at least 40 hours per week) at the partnership's proposed FM station as its Station Manager. HHM&W Ex. 3 at p. 1. As Station Manager, Mr. Horn will have responsibility for the sales operation and staff. *Id.* He will create a marketing plan and will hire and supervise staff to help him implement this plan and the ongoing sales effort for the station. *Id.*

13. Mr. Horn was born in Evansville, Indiana and is forty-three years old. *Id.* He grew up in the city of Evansville within the 1m/vm contour of the proposed Chandler, Indiana FM station and resided there (except for the nine-month college term between 1968 and 1972) until 1974. *Id.* He is currently a bio-medical equipment technician at Duke University Hospital at Durham, North Carolina. Tr. 151. Prior to the commencement of program tests at HHM&W's proposed station, Horn will resign from or discontinue whatever employment or other activities he is engaged in at that time and move his residence to Chandler, Indiana to assume his duties at the proposed station. Hulse Ex. 3.

14. Mr. Horn graduated from Indiana University in 1972 with a B.A. degree in Radio and Television. *Id.* He has worked in broadcasting in the following full-time positions: WIKS-FM, New Bern, North Carolina, Sales Account Executive (3/87 - 8/88); WISP/WQDW-FM, Kinston, North Carolina, Station Manager (Sales) (8/83 - 3/87); WWCM, Brazil, Indiana, General Manager (3/81 - 6/83); WSON/WKDQ-FM, Henderson, KY, Operations Manager (Programming) (6/72 - 7/74). HHM&W Ex. 3, pp. 1-2.

15. *Brent R. Wookey* intends to work on a full-time basis (at least 40 hours per week) at HHM&W's Chandler FM station as its Operations Manager. As Operations Manager, he will have responsibility for the programming operations and staff. He will plan and produce the station's programming and hire and supervise production and announcing staff to assist him. *Id.*

16. If HHM&W's application is granted and prior to the commencement of program tests, Wookey will resign from or discontinue whatever employment or other activities he is engaged in at that time and move his residence to Chandler, Indiana to fulfill the above pledge. *Id.*[2] Mr. Wookey completed a one-year course in Radio and Television at the Brown Institute in Minneapolis, Minnesota in 1976. *Id.* He has worked in broadcasting in the following full-time positions: WSSQ-FM, Sterling, Illinois, Station Manager (Sales) (3/88 - 10/88); WDAN/WDNL-FM, Danville, Illinois, General Manager (9/86 - 9/87), Operations Manager (programming) (6/80 - 9/86), Announcer (8/78 - 6/80); WTIM/WEEE-FM, Taylorville, Illinois, Program Direction (7/76 - 8/78). HHM&W Ex. 4, p. 1-2.

Diversification

17. No principal in HHM&W has any interest in any medium of mass communications. HHM&W Ex. 1, p. 2. Brent Wookey will resign from his position as a part-time announcer with WFLN/WLXR-FM, LaCrosse, Wisconsin prior to the commencement of program tests at HHM&W's proposed station. *Id.*

Auxiliary Power

18. HHM&W will install auxiliary generating equipment at its transmitter site and studios to insure continuous service in the event of an interruption of the flow of electrical power. HHM&W Ex. 5.

Ben L. Umberger

Integration

19. Umberger does not claim any integration credit. Umberger Ex. 1.

Diversification

20. Umberger has no ownership interest in any medium of mass communications nor has any other attributable media interest (Umberger Ex. 1). He does have pending an FCC Form 301 application seeking authority to con-

struct a new FM station on Channel 230A at Noblesville, Indiana (FCC File No. BPH-880301PD, MM Docket No. 90-94) and is currently Chief Operator for WMTX(FM), Clearwater, Florida (formerly WNLT) and WHBO(AM), Pinellas Park, Florida (Umberger Ex. 1).

Geyer Broadcasting Co., Inc.

Structure of the Applicant

21. Geyer Broadcasting Co., Inc. is a corporation with only one class of stock, all of which is owned by Wayne W. Geyer, who is also the corporation's President and Treasurer (Geyer Ex. 1). Wayne W. Geyer's wife, Ellen G. Geyer, is the corporate secretary (Geyer Ex. 1). Wayne W. Geyer, Ellen G. Geyer and Wayne W. Geyer, Jr. (his son) are the directors of Geyer Broadcasting Co., Inc. (Geyer Ex. 1).

Integration

22. Geyer does not claim any integration credit. Geyer Ex. 1.

Diversification

23. Geyer has been the licensee of WHVI, Evansville, Indiana since 1964. *Id.* Evansville is less than ten miles from Chandler. *Id.*

CONCLUSIONS

Diversification

24. HHM&W and Umberger have no media interests. Geyer receives a significant demerit for its ownership of WHVI in nearby Evansville, Indiana.

Integration

25. Of the three applicants, only HHM&W proposes to integrate its principals. Michelle Hulse, 85% general partner, will work 30 hours a week as the station's general manager. Brent R. Wookey, 5% general partner, will work full-time as operations manager and William Horn, 5% general partner, will serve full-time as station manager. HHM&W will receive the integration credit sought here. Each of the principals will perform meaningful management and policy functions and each has delineated his or her managerial and policy functions. Moreover, the management positions the principals will hold are recognized by the Commission as exercising policy functions. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Since Ms. Hulse's proposal is less than full-time, it is appropriate to employ the formula specified in *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 734 (1988) to calculate HHM&W's quantitative integration percentage. When that formula is applied, HHM&W is entitled to a quantitative integration credit of 66.25%.[3]

26. Umberger's contention that Hulse's teaching duties preclude her fulfilling her part-time commitment is rejected. Hulse will work a maximum of 182 days a year in her teaching position from 7:15 AM to 3 PM. She will work at the proposed station on those evenings from 3:15 PM until 8:30 PM and will complete her commitment on weekends during the school term. For three months per year, in addition to school holidays, Hulse will not have any time commitment to her teaching duties whatever. Hulse's total work week is thus 68 hours and forty-five minutes (30 hours at the station plus 38:45 teaching), for nine months per year (aside from vacations during the school term, when it will be less). Ms. Hulse is thirty-seven years of age and has no private, civic or other responsibilities that might make additional demands upon her time. She lives close to both her teaching job and the proposed community of license, so her commuting time will be negligible. Hulse's schedule will permit her to keep her present job as long as she deems necessary. She will also share sufficient work time with the rest of the staff to permit her to exercise overall supervision consistent with her dominant position in the partnership.

27. HHM&W has made a detailed showing of how the proposed integration of Michelle Hulse will be effectuated. *Pentecostal Revival Association*, 1 FCC Rcd 842, 61 RR 2d 1267, 1269 (Rev. Bd. 1986). Where such a detailed showing has been made, the commitment should not be rejected "absent persuasive proof" that it cannot be met. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596, 51 RR 2d 1478, 1487 (Rev. Bd. 1982). No such proof has been presented here. HHM&W has not departed from the proposal contained in its original application and has provided reasonable assurance that it will be carried out. Since HHM&W has made a specific and credible showing of how Hulse's part-time commitment to the proposed station can be effectuated, it deserves to be fully credited. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 659-661, 51 RR 2d 1349, 1345 (Rev. Bd. 1982).

28. In summary, HHM&W deserves quantitative credit of 66.25% for the involvement of its three partners. In view of Umberger and Geyer's lack of any integration credit whatever, this fact alone mandates the award of the authorization at issue to HHM&W, without regard to the enhancement credit due to it for female participation, local residence, civic involvement and broadcast background. *Van Buren Community Service Broadcasters, Inc.*, 50 RR 2d 115, 119 (Rev. Bd. 1981). Even if Hulse's integration is discounted, the unchallenged 10% integration of William Horn and Brent Wookey, as enhanced by past and future local residence and broadcast experience (as well as the partnership's auxiliary power proposal), is more than sufficient to serve as the basis for the award of the permit at issue to HHM&W. *See, e.g., Town & Country Radio, Inc.*, 70 FCC 2d 572 (Rev. Bd. 1978).

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[4] the application of Michelle Elaine Hulse, Et Al. for a construction permit for a New FM Station in Chandler, Indiana, Channel 228(A), IS GRANTED; and the applications of Ben L. Umberger and Geyer Broadcasting Co., Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Ms. Metzger is not proposed to be integrated. She teaches English and is in charge of high school radio broadcast classes. She will assist in the coverage of civic activities and will also refer students to work at the station. Tr. 143.

[2] At the time of the hearing in May 1991, Wookey was in his junior year at the University of Wisconsin in LaCrosse with one year remaining in order to receive his degree. Wookey testified that if the station began operating before he received his degree, he would work full-time at the station and go to the University of Evansville on a part-time basis to complete his degree requirements. Tr. 192.

[3] The formula is (100 x hours per week/40) (squared) x percentage of ownership. According to the formula: Hulse = (100 x 30/40) (sq) x 85%, or 5625; Horn and Wookey = (1000 x 40/40) (sq) x 5%, or 500 each (1000 together). Total: 5625 + 100 = 6625 or 66.25%.

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 18, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S REQUEST FOR LIMITED WAIVER AND US WEST'S NOTICE AND PETITION FOR REMOVAL OF STRUCTURAL SEPARATION REQUIREMENT

CC Docket Nos. 88-2, Phase I, and 90-623

On March 4, 1992, U S West Communications, Inc. (US West) filed a request for a limited waiver of the Commission's requirement that US West file state tariffs for its initial intrastate Open Network Architecture (ONA) services in order to be eligible for structural relief. In its waiver petition, US West states that Information Access, Automatic Circuit and Trunk Monitoring Service, Surrogate Client Number, and Tandem Routing are the intrastate equivalents of initial interstate ONA services for which the Commission has already waived the interstate ONA services tariffing requirement. *See ONA Services Waiver Order*, 7 FCC Rcd 811. US West also seeks a waiver for its Line Alert service, an intrastate ONA service, arguing that it is not technically feasible.

In addition, US West filed a petition for removal of the structural separation requirements that currently govern its participation in the enhanced services industry. Pursuant to the *BOC ONA Amendment Order*, 5 FCC Rcd. 3103, the Bell Operating Companies (BOCs) are permitted to petition the Commission for relief from the structural separation requirements if the BOCs are technically prepared to offer their ONA services, have effective federal tariffs for each of their initial interstate ONA services, and have filed state tariffs for each of their initial intrastate ONA services. US West states that, provided that the Commission waives the intrastate tariff requirement for the five intrastate ONA services described in its waiver request, US West satisfies all of the Commission's conditions for removal of the structural separation requirement.

Interested parties should file comments on US West's request and notice by **April 7, 1992,** and reply comments by **April 17, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of US West's pleadings can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 12, 1992

Released: March 12, 1992

Mr. Randy Rich 8330-O
Station KXXV-TV 92010446
P.O. Box 2522
Waco, Texas 76702-2522

Dear Mr. Rich:

This is in response to your recent correspondence requesting a ruling with respect to the provision of free production services to political candidates. You ask, specifically, if free production is offered to commercial advertisers predicated on the purchase of a certain dollar amount of advertising, would free production have to be offered to candidates irrespective of how much they spend, or would candidates have to meet the minimum purchase requirement to be eligible? In a subsequent telephone conversation with a member of my staff, you asked how, if a minimum purchase is required, this would be applied where the owner of a company who regularly advertises on the station subsequently becomes a "legally qualified candidate?" Specifically, Chuck Scott, owner of "Tire Outlets," a regular advertiser on KXXV, recently became a candidate for a local political office. Mr. Scott is purchasing advertisements for tires on behalf of Tire Outlets, and political advertisements for his candidacy, and seeks free production for his political advertisements based on the amount of advertising purchased for Tire Outlets.

The issue of production costs was not addressed in the recent *Report and Order* on political programming policies, FCC 91-403 (released December 23, 1991). However, in *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476, 1514-15 (1984), the Commission stated that the "lowest unit charge" applies only to time sales and not to production costs. In addition, as a general matter, under Section 315(b) of the Act, 47 U.S.C. Section 315(b), a station or cable system may not discriminate against candidates vis-a-vis commercial advertisers. *See Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981) (interpreting non-discrimination prohibition of Section 315(b)). The Commission's rules also prohibit discrimination between candidates in practices or services. *See* 47 C.F.R. Sections 73.1941(e) and 76.205(e).

Consistent with the policies set forth above, we believe that broadcast stations and cable systems which offer free production to commercial advertisers must offer free production to political advertisers on the same basis. For example, if free production is predicated on a minimum dollar buy for commercial advertisers, absent some evidence of discriminatory treatment of political candidates, free production should be predicated on the same dollar buy for political advertisers. A station or system would not be required in this instance to provide free production, in full or in part, to candidates who had not met the minimum requirement. A broadcaster or cablecaster would also not be required to include free production in any calculation of lowest unit charge.

Where the owner of a company that regularly advertises on a station becomes a political candidate, the station should treat the political candidate the same as a similarly situated commercial advertiser in determining whether the minimum requirement to obtain free production has been met. You indicate that, pursuant to an informal station policy, only time orders from the identical advertiser (e.g. an order from Tire Outlets, the advertiser, for new tires and an order from Tire Outlets for used tires) could be combined to reach the minimum purchase requirement for free production. Thus, in the situation you describe, time orders from Tire Outlets would not be permitted to be combined with time orders from the candidate, Chuck Scott, because, under your station's policy, you would conclude that the identical advertiser is not involved. Under these circumstances, we do not find evidence of discriminatory treatment of political candidates, or of discriminatory application of your station's policy to Chuck Scott.

Staff action is taken here under delegated authority. Application for review by the full Commission may be filed within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 11, 1992

Released: March 12, 1992

Mr. Thomas J. Kelly 8330-O
Committee To Elect Thomas J. Kelly 92020504
4030 N. Campbell
Chicago, Illinois 60618

Dear Mr. Kelly:

This is in response to your recent complaint against WBBM-FM, Chicago, Illinois, alleging violations of the equal opportunity provision of Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 315(a).

You state that you are a legally qualified candidate for the office of Commissioner, Metropolitan Water Reclamation District of Greater Chicago. On December 9, 1991, Gloria A. Majewski, who currently holds that office, became a legally qualified candidate for reelection in the March 17, 1992, primary election in Illinois. You assert that, subsequent to becoming a legally qualified candidate, Ms. Majewski appeared in certain announcements broadcast by station WBBM that included her voice, identified her by name, and referred to her current position. You claim that you requested equal opportunities from WBBM on January 30, 1992, based on Ms. Majewski's appearance in these announcements. You state that WBBM immediately ceased airing these announcements upon learning of your request, but refused to provide you with equal opportunities.

In light of the limited time before the Illinois primary, we requested by telephone that CBS, Inc., licensee of WBBM, submit an expedited response to your allegations. In its response, CBS argues that the announcements complained of did not constitute a "use" within the meaning of Section 315(a), as that term has recently been construed by the FCC, since the announcements were initially recorded and broadcast by the station before Ms. Majewski became a legally qualified candidate. In support of this argument, CBS alleges the following facts. Ms. Majewski's office contacted WBBM about the possibility of the station's running a public service announcement (PSA) in early August 1991. Maria Munoz, the station's Director of Community Affairs, agreed to provide public service time, and asked Ms. Majewski if she were a candidate for public office. Ms. Majewski replied that she was not. On August 13, 1992, the PSA was recorded. According to the best recollection of Ms. Munoz, there was a "general understanding" between Ms. Majewski and the station that the PSA in question would be broadcast for between two and two-and-a-half months, the typical period that a PSA runs on WBBM. The PSA was first aired on September 4, 1991, and normally would have been completed around mid-November. However, the PSA ran until January 30, 1992, because Ms. Munoz was "heavily involved" in another matter, and was, therefore, not closely supervising the discontinuance of aging PSA's. The fact that the station stopped broadcasting the PSA on the same date as your request was "purely coincidental." Ms. Munoz did not know that Ms. Majewski had become a legally qualified candidate prior to your telephone call on January 30.

In response to CBS's letter, you provided us with a copy of one of the petitions filed by Ms. Majewski to secure a place on the ballot. That petition specifically requires that none of the signatures on the petition be signed more than 90 days preceding the last day for the filing of the petition. You note that 90 days prior to December 9, the day on which Ms. Majewski filed, would have been around the beginning of September 1991. You argue that Ms. Majewski, a Commissioner for six years, should have known in mid-August 1991, when she met with Ms. Munoz, that she would be running for another term and would be initiating the signature collection process in less than 30 days.

DISCUSSION

Section 315(a) of the Communications Act provides, in pertinent part, that if a licensee permits a legally qualified candidate for any public office to use its facilities, it shall afford equal opportunities to all other such candidates for that office. In its recent *Report and Order, Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 685 (1991), the Commission narrowed its definition of "use" under Section 315(a) to include "only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate...after the candidate becomes legally qualified." The Commission explained that:

> Under our narrower interpretation, if a legally qualified candidate voluntarily appears as a performer, celebrity, or station employee in a non-exempt program, his opponents will continue to be entitled to equal opportunities. In these circumstances, the candidate controls his appearance on the air and therefore is properly viewed as having "used" the station's facilities. By contrast, if a legally qualified candidate does not voluntarily appear in a non-exempt broadcast, such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, his appearance would not constitute a use.

Id. This new definition was effective on January 4, 1992. *Id.* at 699.

We first note that there is no disagreement between the parties regarding the key facts surrounding your equal opportunities request. Indeed, the only issue which we must decide is whether WBBM correctly interpreted the new definition of a "use" in determining whether equal opportunities should be provided with respect to Ms. Majewski's appearance in a PSA. CBS argues that the meaning of the *Report and Order* is clear and unambiguous in that, if an appearance is made before an individual becomes a legally qualified candidate for public office, the subsequent broadcast of the appearance, not controlled by the candidate, after the person becomes a candidate does not constitute a "use." CBS further claims that:

> The question does not turn on whether the individual may have intended to become a candidate when his appearance was made, or on whether he may have hoped that the ultimate broadcast of the appearance might later help a thenanticipated candidacy. Indeed, any standard based on the candidate's subjective intent would replace the simple, objective test of the *Report and Order* with one which would, at best, be extremely difficult to administer.

CBS points out that the PSA at issue was recorded and initially broadcast by WBBM several months before Ms. Majewski became a legally qualified candidate. Finally, CBS argues that Ms. Majewski did not control the broadcast of the PSA after she became a legally qualified candidate since there was no understanding that the PSA would be continued after the beginning of her campaign.

Based on the foregoing, it does not appear that WBBM violated the equal opportunities provision of Section 315(a) of the Communications Act. The *Report and Order* specifically provides that a rebroadcast of an appearance by a candidate made prior to her attaining the status of a legally qualified candidate does not constitute a "use" unless the subsequent broadcast is controlled, approved, or sponsored by the candidate. There is no evidence before us to suggest that Ms. Majewski controlled, approved, or sponsored the rebroadcast of the PSA's at issue. Furthermore, the station's agreement to broadcast the PSA appears to have been premised on the fact that Ms. Majewski was not a legally qualified candidate for public office. Thus, there is nothing to suggest that WBBM intended to air the PSA when Ms. Majewski was a candidate or to otherwise promote her candidacy. *Cf.* 7 FCC Rcd at 685 n. 55. Moreover, WBBM indicates that it broadcast the PSA's after Ms. Majewski became a legally qualified candidate only as a result of inadvertance on its part. Therefore, Ms. Majewski's appearances therein were not "uses" and WBBM is not required to provide you with equal opportunities.

In light of the foregoing, your complaint is hereby DENIED. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)] by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff Transmittal No. 7

Contract Tariff F.C.C. No. 3

ORDER

Adopted: March 12, 1992; Released: March 12, 1992

By the Chief, Common Carrier Bureau:

1. On February 28, 1992, AT&T Communications (AT&T) filed Contract Tariff Transmittal No. 7 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 3 for AT&T Software Defined Network Service, AT&T Pro WATS Service, Accunet Spectrum of Digital Services, Accunet T1.5 Service, and Dataphone Digital Services.

2. On March 6, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or in the alternative to suspend and investigate Contract Tariff Transmittal No. 7.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal No. 7 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 3, Transmittal No. 7, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon. pending*.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Donna R. Searcy
Secretary

In the Matter of

Amendment of § 90.175 of the Commission's Rules Governing the Frequency Coordination Process — RM-6908

ORDER

Adopted: February 20, 1992; Released: March 18, 1992

By the Commission:

1. On August 1, 1990, the Chief of the Private Radio Bureau (Bureau), acting pursuant to delegated authority, adopted an *Order*[1] dismissing a Petition for Rule Making (RM-6908) filed jointly by the International Municipal Signal Association (IMSA) and the International Association of Fire Chiefs, Inc. (IAFC).[2] The petitioners had sought to amend Section 90.175(b) of the Commission's Rules, 47 C.F.R. § 90.175(b), to "require Public Safety and Special Emergency applicants for 800 MHz assignments to apprise the Commission and all...coordinators of their continuing need for licensed assignments...below 800 MHz." On September 10, 1990, IMSA and IAFC (IMSA/IAFC) jointly submitted an application for review of the Bureau's *Order*.[3]

2. IMSA/IAFC are concerned that they will be unable to identify frequencies that are vacated by public safety entities migrating to the new 821-824 MHz and 866-869 MHz bands. IMSA/IAFC's Application for Review merely restates the arguments made in their Petition for Rule Making -- arguments that were thoroughly addressed in the Bureau's *Order*. As indicated in the Bureau's *Order*, the Commission developed a National Plan establishing planning regions to ensure that public safety entities use the new public safety frequencies effectively. The National Plan also indicated that licensees moving to the new bands should make every effort to vacate their lower band frequencies[4] and the various regional plans contain procedures for returning vacated frequencies when licensees obtain new 800 MHz public safety frequencies. We, therefore, affirm the Bureau's *Order* concluding that the petitioners have not provided any new evidence that the processes we have established for dealing with vacated channels do not adequately resolve their identified concerns.

3. Accordingly, IT IS ORDERED that pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by IMSA/IAFC IS DENIED and the Bureau's action IS AFFIRMED.

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[1] Order, 5 FCC Rcd 4866 (1990).
[2] The Petition for Rule Making appeared on public notice August 1, 1989 (Report No. 1789).
[3] The Special Industrial Radio Service Association, Inc. (SIRSA) filed comments supporting the Application for Review; the Associated Public-Safety Communications Officers, Inc. (APCO) filed comments in opposition; and IMSA/IAFC filed reply comments.
[4] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905, para. 62 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-1

In the Matter of

Lubbock Area Public Safety Plan

ORDER

Adopted: March 12, 1992; Released: March 18, 1992

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On November 12, 1991, Region 52 (Lubbock) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the Lubbock area. On December 20, 1991, Lubbock filed revisions to the Plan, based on conversations with the Commission's staff.

2. The Lubbock Plan was placed on Public Notice for comments on January 3, 1992, 57 FR 1267 (January 13, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Lubbock and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Lubbock area.

4. Therefore, we accept the Lubbock Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the Lubbock area may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 18, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S PETITION FOR STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

On March 9, 1992, the Bell Atlantic telephone companies (Bell Atlantic) filed a notice of compliance with the Open Network Architecture (ONA) requirements for removal of the structural separation requirements that currently govern its participation in the enhanced services industry. Pursuant to the *BOC ONA Amendment Order*, 5 FCC Rcd 3103, the Bell Operating Companies (BOCs) are permitted to petition the Commission for relief from the structural separation requirements if the BOCs are technically prepared to offer their ONA services, have effective federal tariffs for each of their initial interstate ONA services, and have filed state tariffs for each of their initial intrastate ONA services. Bell Atlantic states that it satisfies all of the Commission's conditions for removal of the structural separation requirement.

Interested parties should file comments on Bell Atlantic's notice by **April 10, 1992,** and reply comments by **April 20, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of Bell Atlantic's notice can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3907
Tariff F.C.C. No. 11

ORDER

Adopted: March 13, 1992; Released: March 13, 1992

By the Chief, Common Carrier Bureau:

1. On March 2, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective March 16, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing increases monthly rates for AT&T's access coordination functions associated with Voice Grade Local Channel Service, Accunet Generic Digital Access Service, and Accunet Flexible Digital Access Service.

2. On March 9, 1992, Aeronautical Radio, Inc. (Arinc) filed a petition for rejection or, in the alternative, suspension and investigation of the captioned transmittal.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3907 and Arinc's pleading. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition for rejection or, in the alternative, suspension and investigation of AT&T Communications Tariff F.C.C. No. 11, Transmittal No. 3907, filed by Aeronautical Radio, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon. pending*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-359

In the Matter of

Amendment of Section 73.202(b), RM-7835
Table of Allotments,
FM Broadcast Stations.
(Hinesville, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1992; Released: March 19, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 7275 (1991), issued in response to a petition for rule making filed by Bullie Broadcasting Corporation ("petitioner"), proposing the substitution of Channel 284C3 for Channel 284A at Hinesville, and the modification of its construction permit (BPH-890504MN) to specify operation on the higher powered channel.[1] Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 284C3 for Channel 284A at Hinesville, Georgia, in order to provide the community with an additional wide coverage area FM service. As indicated in the *Notice*, Channel 284C3 can be allotted to Hinesville in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.8 kilometers (7.9 miles) west[2] in order to avoid short-spacing to Station WFYV(FM), Channel 283C, Atlantic Beach, Florida. Channel 284C3 is short-spaced to Channel 285A, Station WHCG(FM), Metter, Georgia. However, Station WHCG was ordered in MM Docket No. 89-418 to specify operation on Channel 279A. *See* 6 FCC Rcd 5793 (1991). Therefore, the grant of a license for Channel 284C3, Hinesville, may be withheld until Station WHCG(FM) is licensed on Channel 279A at Metter, Georgia. As proposed, we will also modify petitioner's construction permit for Station WHVL(FM) to specify operation on Channel 284C3 at Hinesville, Georgia, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hinesville, Georgia	222C2, 284C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WHVL-FM, Hinesville, Georgia, IS MODIFIED, to specify operation on Channel 284C3 in lieu of Channel 284A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Bullie Broadcasting Corporation, permittee of Station WHVL-FM, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Bullie Broadcasting Corporation, seeking the substitution of Channel 284C3 for Channel 284A at Hinesville, Georgia, IS HEREBY DISMISSED as moot.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Petitioner's request was originally returned by letter because it was dependent upon final action in MM Docket No. 89-418. *See* Letter from Chief, Allocations Branch, to counsel for Bullie Broadcasting Corporation (July 10, 1991). Petitioner filed a petition for reconsideration of the action. That petition for reconsideration is moot as a result of this proceeding.

[2] The coordinates for Channel 284C3 at Hinesville are North Latitude 31-52-18 and West Longitude 81-43-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-232

In the Matter of

Amendment of Section 73.202(b), RM-7755
Table of Allotments,
FM Broadcast Stations.
(Wilburton and Antlers, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1992; Released: March 19, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Blue Mountain Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4760 (1991), proposing the substitution of Channel 279C1 for Channel 279A at Wilburton, Oklahoma, and the modification of its construction permit for Station KZUD to specify operation on the higher powered channel. To accommodate the Wilburton allotment, the *Notice* also proposed to substitute Channel 284A for unoccupied and unapplied for Channel 281A at Antlers. Petitioner filed comments reiterating its intention to apply for Channel 279C1, if allotted. No other comments were received.[1]

2. We believe the public interest would be served by substituting Channel 279C1 for Channel 279A at Wilburton and by substituting Channel 284A for Channel 281A at Antlers, since it could provide Wilburton with a wide coverage area FM service and enable Station KZUD to expand its service area. As proposed, we will also modify Station KZUD's construction permit to specify operation on Channel 279C1. Channel 279C1 can be allotted to Wilburton in compliance with the Commission's minimum distance separation requirements with a site restriction of 36.2 kilometers (22.5 miles) west to avoid short-spacings to Channel 276C2 at Atoka, Oklahoma, which is reserved for use by Station KHKC-FM; Station KKYK, Channel 279C, Little Rock, Arkansas; and Station KKIX, Channel 280C1, Fayetteville, Arkansas. Channel 284A can be allotted to Antlers without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Wilburton, Oklahoma	279C1
Antlers, Oklahoma	284A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Blue Mountain Broadcasting for Station KZUD, Wilburton, Oklahoma, IS MODIFIED to specify operation on Channel 279C1, in lieu of Channel 279A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Blue Mountain Broadcasting, permittee of Station KZUD, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Informal comments in opposition to the proposed allotment at Wilburton were filed by Station KPRV-AM and FM. However, these comments were not served on the petitioner and thus constitute an *ex parte* contact. *Ex parte* presentations in non-restricted proceedings, such as this one, are any communications directed to the merits or outcome of a proceeding, which, if written, are not served on all parties to the proceeding. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation. *See* Sections 1.1201 and 1.1207 of the Commission's Rules. Therefore, the comments of Station KPRV-AM and FM will not be considered herein.

[2] The coordinates for Channel 279C1 at Wilburton are North Latitude 34-59-06 and West Longitude 95-41-53. The coordinates for Channel 284A at Antlers are 34-13-54 and 95-36-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-191

In the Matter of

Amendment of Section 73.202(b), RM-7070
Table of Allotments,
FM Broadcast Stations.
(Liberty Hill, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1992; Released: March 19, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Jeffrey C. Sigmon ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4227 (1991), proposing the allotment of Channel 252A to Liberty Hill, South Carolina, as its first local FM service. Comments in support of the allotment were filed by the petitioner. No other comments were received.

2. In the *Notice*, petitioner was requested to provide further information to demonstrate that Liberty Hill has social, economic, cultural or governmental indicia to qualify it as a "community" for allotment purposes since it not listed in the 1980 U.S. Census or incorporated. In response, petitioner states that Liberty Hill has a fulltime post office, two churches, a general store and a marina on Lake Wateree. In addition, it submits that Liberty Hill is the largest community within a twelve mile radius, with a preliminary 1990 census count of 385 persons residing within the Liberty Hill Voting Precinct. Although petitioner recognizes that Liberty Hill is small in population, he contends that it is a growing community deserving of a local radio service. Petitioner states that Liberty Hill lies within the 60 dBu contour of only the Columbia, South Carolina and Charlotte, North Carolina, stations but that they fail to provide regular programming service to either Liberty Hill or Kershaw County.

3. Liberty Hill is neither incorporated nor listed in the 1990 U.S. Census. While petitioner in his rule making request stated that Liberty Hill has a population of 525 persons, he now attributes a population of 385 persons to the "Liberty Hill Voting Precinct." However, he provides no explanation for the discrepancy and does not state whether the Voting Precinct is coterminous with the boundaries of Liberty Hill or whether it covers outlying areas as well. Therefore, we are unable to attribute a population to Liberty Hill itself.[1] Additionally, other than a newspaper article from *The Lancaster News* describing a fund-raiser for the Liberty Hill Presbyterian Church, petitioner provides no information about Liberty Hill beyond what was provided in the petition. Petitioner provides no evidence of a local government. Neither the general store nor the marina, which appear to be the only businesses in Liberty Hill, identify themselves with Liberty Hill. Finally, there are no civic organizations, such as a Lions Club or Rotary Club, which identify themselves with Liberty Hill. As the Commission has stated previously, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983), *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991) and *Trade Tennessee and Beech Mountain, North Carolina*, 6 FCC Rcd 5835 (1991). Furthermore, the presence of a post office, by itself, is not indicative of community status. *See Coker, Alabama*, 43 RR 2d 190 (1978). Therefore, based upon the showing submitted by the petitioner, we do not believe that Liberty Hill is a "community" for allotment purposes.

4. Accordingly, IT IS ORDERED, That the petition filed by Jeffrey C. Sigmon (RM-7070) to allot Channel 252A to Liberty Hill, South Carolina, IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] According to the 1992 Rand McNally Commercial Atlas, Liberty Hill has a population of 150 persons.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-434

In the Matter of

Amendment of Section 73.202(b),	
Table of Allotments,	RM-6866
FM Broadcast Stations.	RM-6830
(Naples, Winter Park, and	RM-7107
Okeechobee, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 10, 1992; Released: March 19, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 7114 (1989), proposing the substitution of Channel 276C3 for Channel 276A at Naples, Florida, and modification of the license of Station WSGL-FM, Naples, to specify operation on Channel 276C3. Sterling Communications Corporation ("Sterling") filed comments and reply comments. Sunshine State Broadcasting Company, Inc., Litchfield Broadcasting Company, Okeechobee Broadcasters, Inc., and Treasure Coast Media, Inc. filed reply comments. Finally, Gross Communications Corporation, Okeechobee Broadcasters, Inc., Sunshine State Broadcasting Company, Inc., and Sterling Communications Corporation filed Joint Supplemental Comments. For the reasons discussed below, we are upgrading Station WSGL-FM to specify operation on Channel 276C3. In addition, we are upgrading Station WOKC-FM, Okeechobee, Florida, to specify operation on Channel 276C2, and Station WLOQ-FM, Winter Park, Florida, to specify operation on Channel 276C3.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Sterling proposing the substitution of Channel 276C3 for Channel 276A at Naples, and the modification of its Station WSGL-FM license to specify operation on Channel 276C3. At the time of the *Notice* in this proceeding, there were two pending petitions for rule making which conflicted with the proposed Channel 276C3 upgrade at Naples. The first petition for rule making was filed by Okeechobee Broadcasters, Inc. ("Okeechobee Broadcasters"), licensee of Station WOKC-FM, Channel 276A, Okeechobee, Florida, proposing the substitution of Channel 276C2 for Channel 276A at Okeechobee, Florida, and modification of its Station WOKC-FM license to specify operation on Channel 276C2 (RM-7107). The second petition for rule making was filed by Litchfield Broadcasting Company ("Litchfield"), licensee of Station WLOQ-FM, Channel 276A, Winter Park, Florida, proposing the substitution of Channel 276C3 for Channel 276A at Winter Park, Florida, and modification of its Station WLOQ-FM license to specify operation on Channel 276C2 (RM-6830).[2] Both of these petitions for rule making were processed as timely counterproposals in this proceeding.[3]

3. In response to the Public Notice announcing the acceptance of the Winter Park petition for rule making as a counterproposal in this proceeding, Sunshine State Broadcasting, Inc. ("Sunshine"), licensee of Station WDUV, Bradenton, Florida, filed reply comments directed against the proposed Channel 276C3 upgrade for Station WLOQ-FM at Winter Park. In its reply comments, Sunshine referred to its pending application (File No. BPH-860313ID) to maintain full Class C status for Station WDUV.[4] That application conflicts with the proposed Station WLOQ-FM upgrade. In a related context, Sunshine also filed an "Opposition to Petition for Rule Making" directed against the underlying Winter Park petition for rule making. The gravamen of these pleadings is that Winter Park petition for rule making should not take precedence over the Station WDUV application, and that the full Class C status at Station WDUV would have a greater public interest benefit than an upgrade for Station WLOQ-FM.

4. After the close of the comment period, Gross Communications Corporation, Sunshine, Okeechobee Broadcasters, and Sterling filed Joint Supplemental Comments looking toward a resolution of this proceeding. Specifically, each rule making proponent will modify the proposed reference coordinates for its upgrade to remove the mutual exclusivity between the rule making proposals.[5] In addition, the new reference coordinates for the upgrade at Winter Park will enable Station WDUV to file an application to maintain full Class C status.[6]

5. We believe that it would be in the public interest to provide additional wide area FM services to Naples, Okeechobee, and Winter Park, Florida. Each allotment can be made in compliance with the Commission's minimum

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[1] The communities of Winter Park and Okeechobee have been added to the caption.

[2] The Station WLOQ-FM license was assigned to Gross Communications Corporation on March 2, 1990 (File No. BALH-900124HG).

[3] Public Notice of these counterproposals was given on February 6, 1990, (Report No. 1807).

[4] That application was returned on June 23, 1988. Sunshine filed an Application for Review directed against that action. On June 22, 1989, Sunshine filed a second Application for Review directed against a subsequent staff action returning an amendment to the application. Both Applications for Review remain pending.

[5] Treasure Coast Media, Inc., permittee of Station WCXL, Vero Beach, Florida, filed reply comments directed against the proposed Channel 276C2 upgrade at Okeechobee. These reply comments concern the suitability of the proposed transmitter site for the Channel 276C2 upgrade. Inasmuch as we are modifying the reference coordinates for the Okeechobee proposal, these reply comments need not be considered.

[6] Pursuant to the agreement among the parties, Sunshine has requested that both of its Applications for Review be dismissed.

distance separation requirements. Therefore, we will substitute Channel 276C3 for Channel 276A at Naples, Channel 276C2 for Channel 276A at Okeechobee, and Channel 276C3 for Channel 276A at Winter Park, and modify the authorizations accordingly for Stations WSGL-FM, WOKC-FM and WLOQ-FM, accordingly.[7] [8] The application for Channel 276C2 at Okeechobee must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Vero Beach, Florida.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Naples, Florida	228A, 233C, 276C3, 288A
Okeechobee, Florida	276C2
Winter Park, Florida	276C3

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gross Communications Corporation for Station WLOQ-FM, Winter Park, Florida, IS MODIFIED to specify operation on Channel 276C3 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sterling Communications Corporation for Station WSGL-FM, Naples, Florida, IS MODIFIED to specify operation on Channel 276C3 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Okeechobee Broadcasters, Inc. for Station WOKC-FM, Okeechobee, Florida, IS MODIFIED to specify operation on Channel 276C2 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[7] The reference coordinates for the Channel 276C3 allotment at Naples, Florida, are 26-01-45 and 81-43-25. This site is 14.5 kilometers (9 miles) southeast of Naples. The reference coordinates for the Channel 276C2 allotment at Okeechobee, Florida, are 27-12-55 and 80-31-50. This site is 30 kilometers (18.6 miles) east of Okeechobee. The reference coordinates for the Channel 276C3 allotment at Winter Park, Florida, are 28-34-00 and 81-30-00. This site is 21.7 kilometers (13.5 miles) northwest of Winter Park.

[8] The Winter Park petition for rule making was filed prior to October 2, 1989, and, therefore, has been examined under the minimum spacing requirements set forth in Section 73.213(c)(1) of the Commission's Rules. We note that the Winter Park upgrade proposal complies with the new spacing requirements with respect to all existing stations and reference coordinates. However, while the Winter Park allotment clears all eleven applications for the Channel 277A allotment at Holly Hill, Florida, it would be short-spaced to those applications under the new spacing requirements. Therefore, the licensee of Station WLOQ-FM, Channel 276C3, Winter Park, will be permitted to avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to the pending applications for Channel 277A at Holly Hill.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-336

In the Matter of

Amendment of Section 73.202(b), RM-7757
Table of Allotments,
FM Broadcast Stations.
(Leesburg and Unadilla, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1992; Released: March 19, 1992

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Rowland Albany Radio, Inc. ("Rowland"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 6646 (1991), proposing the substitution of Channel 278C3 for Channel 279A at Leesburg, Georgia, and modification of its construction permit for Station WEGC(FM)[1] to specify operation on Channel 278C3. The *Notice* also proposed the substitution of Channel 260A for vacant but applied for Channel 278A at Unadilla, Georgia. Rowland filed comments restating its intention to apply for Channel 278C3, if allotted. Dallas M. Tarkenton ("Tarkenton"), applicant for Channel 278A at Unadilla, Georgia, filed opposing comments. Rowland filed reply comments.

2. Tarkenton in his comments opposes the substitution of Channel 260A for Channel 278A at Unadilla. Tarkenton argues that the substitution of channels will require him to amend his application to specify a new transmitter site. Tarkenton states that the "permissible site zone" for Channel 260A at Unadilla is a miniscule area in which it would be impossible to locate a suitably-spaced transmitter site. He contends that the reference point for Channel 260A is located in a swamp and, is short-spaced to Station WSGY(FM), Channel 262C, Tifton, Georgia, by .01 kilometers.[2]

3. Rowland in reply comments argues that Tarkenton ignores the Commission's established policy that rule making proposals that provide new service benefits are generally preferred over an application which represents a preference for a particular site, citing *Andalusia, Alabama*, 49 FR 32201, August 13, 1984, *Las Vegas, Nevada*, 51 FR 9453, March 19, 1986, and *Kurten, Texas*, 6 FCC Rcd 4373 (1991). Rowland states that there is land available should Tarkenton be required to relocate his site. Rowland investigated Tarkenton's allegations and discovered that there is property available for use as a transmitter site. Rowland submit copies of statements from Marvin C. Jones ("Jones") and Ronny J. Youngblood ("Youngblood"), both of whom state that land is available for a transmitter site at Unadilla in the "permissible site zone". Rowland also submit a technical statement which demonstrates that the proposed coordinates are fully spaced under Section 73.207.

4. Tarkenton fails to demonstrate that the Unadilla channel substitution should not be implemented. A Commission engineering analysis has determined that Channel 260A can be allotted to Unadilla in compliance with the minimum spacing requirements. Furthermore, Rowland's statements from Jones and Youngblood, and its technical statement, demonstrate that land is available for a transmitter site at Unadilla in the "permissible site zone." It is Commission policy that rule making proposals that provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984, *Las Vegas, Nevada*, 51 FR 9453, March 19, 1986, and *Kurten, Texas*, 6 FCC Rcd 4373 (1991). Therefore, Tarkenton will be required to amend his application to specify a non-conflicting site without loss of cut-off protection.

5. We believe the public interest would be served by the substitution of Channel 278C3 for Channel 279A at Leesburg, since it would provide the community with a wide coverage area FM service. Channel 278C3 can be allotted to Leesburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.7 kilometers (7.3 miles) southeast of the community.[3] Channel 260A can be substituted for vacant but applied for Channel 278A at Unadilla in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.3 kilometers (2.1 miles) northwest of the community.[4] The site restriction is necessary in order to avoid a short-spacing to Station WSGY(FM), Channel 262C, Tifton, Georgia. In accordance with Section 1.420(g) of the Commission's Rules, we will modify the construction permit for Station WEGC(FM) at Leesburg to specify operation on Channel 278C3.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

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[1] Formerly Station WIKX(FM).

[2] Tarkenton also claims that this substitution contravenes the policy established in MM Docket No. 84-231 in which the Commission stated that channels could be substituted after the filing window had closed, provided the substitute channel complies with the spacing requirements of the sites specified in the pending applications, citing *Memorandum Opinion and Order*, 51 FR 36401, October 10, 1986, and *Zebulon and Montezuma, Georgia*, 4 FCC Rcd 2177 (1989). However, this policy applied only to channels allotted in MM Docket No. 84-231, whereas Channel 278A at Unadilla was allotted in MM Docket No. 89-55. In any event, this policy has been struck down by the Court of Appeals. *See Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989). Therefore, we need not consider this argument.

[3] The coordinates for Channel 278C3 at Leesburg are North Latitude 31-39-09 and West Longitude 84-05-20.

[4] The coordinates for Channel 260A at Unadilla are North Latitude 32-17-13 and West Longitude 83-45-13.

City	Channel No.
Leesburg, Georgia	278C3
Unadilla, Georgia	260A

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WEGC(FM), Leesburg, Georgia, IS MODIFIED to specify operation on Channel 278C3 in lieu of Channel 279A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Rowland Albany Radio, Inc., permittee of Station WEGC(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

9. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 278A at Unadilla, Georgia, as follows:

Dallas M. Tarkenton

100 Wexford Place

Athens, Georgia 30606

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-592

In the Matter of

Amendment of Section 73.202(b),	RM-7074
Table of Allotments,	RM-7659
FM Broadcast Stations.	
(Oak Grove, Bastrop and	
Dubach, Louisiana)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1992; Released: March 19, 1992

By the Acting Chief, Allocations Branch:

1. At the request of 96.7 FM Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7276 (1990), proposing the substitution of Channel 244C2 for Channel 244C3 at Oak Grove, and the modification of its license to specify the higher powered channel. In order to accommodate the allotment of Channel 244C2 to Oak Grove, petitioner also requested the substitution of Channel 248A for Channel 247A at Bastrop, Louisiana. William W. Brown ("Brown") filed a counterproposal requesting the substitution of Channel 249C3 for Channel 249A at Dubach, Louisiana.[2] Max Broadcasting Company ("Max") filed comments opposing petitioner's proposal to substitute Channel 248A for Channel 247A at Bastrop, Louisiana. Cane River Communications, Inc., licensee of Station KDBH-FM, Channel 249A, Natchitoches, Louisiana, filed comments.[3] Brown and Max filed reply comments.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. In this instance, the petitioner expressed no such interest in pursuing the proposed substitution of Channel 244C2 for Channel 244C3 at Oak Grove, Louisiana. Therefore, since no such interest has been expressed, we shall dismiss petitioner's proposal to allot Channel 244C2 to Oak Grove, Louisiana. *See, e.g., Joshua Tree, CA*, 54 FR 18557, May 1, 1989, *Senatobia, Mississippi*, 3 FCC Rcd 4000 (1988), and paragraph 2 of the Appendix of the *Notice*.[4]

3. Since no further consideration is warranted regarding the Oak Grove upgrade, we believe the public interest would be served by adopting Brown's counterproposal requesting the substitution of Channel 249C3 for Channel 249A at Dubach, Louisiana, because it would provide Dubach with an expanded coverage area FM service. Channel 249C3 can be allotted to Dubach in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.4 kilometers (3.3 miles) south to accommodate Brown's desired site.[5] However, the issuance of a license for Channel 249C3 may be withheld until Station KDBH-FM, Channel 247A, Natchitoches, Louisiana, is licensed on Channel 247C3.[6] As requested, we will also modify Station KPCH-FM's license to specify operation on Channel 249C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dubach, Louisiana	249C3

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of William W. Brown for Station KPCH-FM, Dubach, Louisiana, IS MODIFIED to specify operation on Channel 249C3, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

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[1] The community of Dubach, Louisiana, has been added to the caption.

[2] Public Notice of the counterproposal was given on March 6, 1991, (Report No. 1839).

[3] Cane requests that the Commission substitute Channel 247C3 for Channel 249A at Natchitoches, Louisiana. Since there was no technical conflict between the Natchitoches proposal and petitioner's, we issued a separate *Notice* to address the proposed Natchitoches upgrade. The Natchitoches upgrade was adopted by *Report and Order* on August 14, 1991. *See* 6 FCC Rcd 5137 (1991). Therefore, Cane's comments need not be discussed.

[4] Therefore, Max's opposing comments need not be discussed.

[5] The coordinates Channel 249C3 at Dubach are North Latitude 32-39-11 and West Longitude 92-40-38.

[6] As previously stated, Station KDBH-FM was modified from Channel 249A to Channel 247C3 in MM Docket No. 91-109. We will serve the licensee of Station KDBH-FM with a copy of this *Report and Order*.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, William W. Brown, licensee of Station KPCH-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KDBH-FM, Natchitoches, Louisiana, as follows: Cane River Communications Inc., 720 Front Street, Natchitoches, Louisiana 71458-0607.

8. IT IS FURTHER ORDERED, That the petition for Rule Making filed by 96.7 FM Radio, Inc. (RM-7074), requesting the allotment of Channel 244C2 to Oak Grove, Louisiana, and the substitution of Channel 248A for Channel 247A at Bastrop, Louisiana, IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC.

For Renewal of License for Station WCBM(AM), Baltimore, Maryland

File No. BR-880830UA

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. (Assignor)

and

WCBM MARYLAND, INC. (Assignee)

For Consent to the Assignment of License of Station WCBM(AM) Baltimore, Maryland

File No. BAL-881117EB

MOUNT VERNON BROADCASTING Baltimore, Maryland

For a Construction Permit for a New AM Station

File No. BP-880901AD

Appearances

J. Richard Saas, Esq., on Bennett Gilbert Gaines; *Martin R. Leader, Esq., Kathryn R. Schmeltzer, Esq., John K. Hane, III, Esq.*, on behalf of WCBM Maryland, Inc.; *Barry D. Wood., Esq.*, on behalf of Mount Vernon Broadcasting; and *Larry Miller, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: March 13, 1992; Released: March 20, 1992

PRELIMINARY STATEMENT

1. This case involves the competing applications of Bennett Gilbert Gaines, as Interlocutory Receiver for Magic 680, Inc., for renewal of the license to operate AM station WCBM, 680 kHz, Baltimore, Maryland, and of Richard V. Falcon d/b/a Mount Vernon Broadcasting ("MVB") for a construction permit for the 680 kHz facilities. Mr. Gaines proposes to assign the WCBM license to WCBM Maryland, Inc. ("WCBM Maryland").[1]

2. The applications were designated for hearing by *Hearing Designation Order*, 5 FCC Rcd 2052 (1990), released June 22, 1990, ("*HDO*"). The *HDO* specified a site availability issue with respect to MVB, and the standard comparative issue.

3. By *Memorandum Opinion and Order*, FCC 90M-1760, an issue was added against WCBM Maryland to determine whether control of WCBM had been transferred prematurely to WCBM Maryland. By *Memorandum Opinion and Order*, FCC 91M-432, released February 5, 1991, a financial issue was added against MVB.

4. Hearing sessions on the site availability, premature transfer of control and standard comparative issues were held at the Commission on November 26 through 30, 1990, with a rebuttal hearing on December 17 and 18, 1990. Hearing sessions on the financial issue were held on May 6, 7, 8 and 9, 1991.

FINDINGS OF FACT

Basic Qualification Issues

The Unauthorized Transfer of Control

5. Station WCBM was formerly licensed to Magic 680, Inc. ("Magic"), which purchased it from Metromedia Inc. Because of financial difficulties, the station went off the air in the spring of 1988. Mr. Bennett Gaines was appointed Interlocutory Receiver for Magic after being recommended to Metromedia (the principal creditor) by a friend at Gordon, Feinblatt, Rothman, Hoffberger Hollander (a Baltimore law firm) (Tr. 486). On July 28, 1988, the FCC granted a "short form" application for the assignment of the WCBM license from Magic 680 to Bennett Gilbert Gaines, Interlocutory Receiver (Gaines Ex. 1, p. 1).

6. Mr. Gaines is an attorney. While Mr. Gaines had no previous experience in broadcasting before his appointment as Receiver for Magic 680, he has been involved in many insolvencies and has worked with other Receiverships. He has been Chairman of the Banking, Business and Bankruptcy Committee of the Bar Association and has testified as an expert witness in bankruptcy court (Gaines Ex. 1, p. 1; Tr. 178-79). After the Receivership became the licensee of WCBM in July 88, Mr. Gaines took control of all of the assets of Magic 680. On August 28, 1988, WCBM resumed broadcasting under Mr. Gaines' supervision (Gaines Ex. 1, pp. 1-2).

7. When the station first returned to the air in August 1988, Mr. Gaines did not personally operate the station on a day-to-day basis. Instead, he hired other people who he believed were professionally qualified to put the station on the air and to operate it. He discussed with those he hired the basic operating guidelines at the beginning, before resuming broadcasting from the station. They discussed programming, compliance with FCC technical requirements, advertising and other basic matters. They agreed on format and policies, and Mr. Gaines allowed the professionals to do the job he hired them to do: operate the radio station. He maintained control over the assets of the Receivership, for which expertise he was appointed as Receiver, but did not interfere with the administrative actions of the persons he hired to operate the station, except to determine that they were operating as he had instructed. Mr. Gaines visited the station occasionally to assess the end product (Gaines Ex. 1, p. 3).

8. As Receiver, Mr. Gaines was obligated to arrange for the orderly disposition of the assets of the Receivership for the benefit of creditors, and to preserve and protect the FCC license by operating the station in the public interest pending consummation of a transfer of the license and other assets to a qualified buyer (Gaines Ex. 1, p. 2). Once WCBM resumed broadcasting, Mr. Gaines began looking for a purchaser and permanent licensee for the station. On August 30, 1988, he re-filed an application for renewal of the WCBM license. Magic 680's timely filed application for renewal had been returned because of insufficient funds to clear the filing fee check. After refiling the application for renewal, Mr. Gaines continued to search for a qualified buyer for WCBM.

9. Mr. Gaines had extensive discussions with several parties interested in purchasing WCBM in the late summer and early autumn of 1988, but did not receive an acceptable offer from a qualified buyer (Gaines Ex. 1, p. 4). In the fall of 1988, Mr. Gaines began negotiating with Nicholas B. Mangione, a long time Baltimore resident and well known businessman, who had expressed an interest in purchasing the station. Mr. Mangione made an offer for the station and demonstrated his ability to pay the negotiated price. Mr. Gaines found the offer acceptable (Gaines Ex. 1, p. 4).

10. On October 19, 1988 Mr. Gaines entered an agreement to sell the assets to WCBM Maryland, a company formed by Mr. Mangione for the purpose of purchasing and operating the station. Metromedia, which had formerly been the licensee of WCBM, had also been the primary secured creditor of Magic 680. Metromedia held a first priority security interest in most of the equipment used in the operation of WCBM and held a leasehold interest in the station's transmitter site. In connection with Mr. Mangione's agreement to purchase the assets of the Receivership, Metromedia entered separate agreements, also on October 19, 1988, by which it agreed to sell its equipment and sublease the transmitter site to WCBM Maryland (Gaines Ex. 1, pp. 4-5; WCBM Ex. 3, p. 1). Concurrently with these agreements, Metromedia formally agreed to lease to Mr. Gaines substantially all of the assets in which it held a security interest and which were used in the operation of WCBM (Gaines Ex. 1, pp. 4-5).

11. At that time Mr. Gaines also was very interested in entering into a consulting agreement and discussed with Mr. Mangione a method of operating the station in the interim until the purchase of the station could be approved by the FCC. There was a meeting in Mr. Gaines' office in September 1988 in which the entire transaction was discussed. The meeting was attended by Mr. Gaines, Thomas Dougherty, Sr., his FCC counsel, the state receivership counsel, representatives of Metromedia, Mr. Mangione, as well as other representatives of WCBM Maryland, and a representative of Sillerman-Magee, another secured creditor of WCBM. During the discussions, the representative for Sillerman-Magee telecopied an agreement to be used as a starting point for drafting a consulting agreement (Tr. 313-15, 320). There were many drafts of a consulting agreement because a lot of people were involved in the process. Mr. Gaines circulated the drafts to Mr. Dougherty to make certain they complied with FCC law (Tr. 474; MVB Exs. 13-18). Mr. Gaines testified that WCBM Maryland did not assume any position in connection with the operation of WCBM until after he reached an understanding based on his counsel's advice that the agreement passed FCC muster (Tr. 472). The purchase agreement filed November 17, 1988 (FCC BAL-881117EB) describes the consulting agreement as a "consulting and interim management agreement." The consulting agreement, dated October 19, 1988, provides that "the Consultant, WCBM Maryland, Inc., shall be deemed the agent of the Receiver for the purpose of assisting in the operation of WCBM, subject to the terms and conditions of this Agreement, the direction and control of the Receiver, and the rules and regulations of the FCC." (Gaines Ex. 3, pp. 1-2). Under the consulting agreement, WCBM Maryland is responsible for all of the operating expenses of the station, subject to its obligation to pay expenses (Gaines Ex. 3, pp. 3-4; WCBM Ex. 3, p. 2; Tr. 451).

12. In the fall of 1988, Mr. Gaines had various meetings with Mr. Mangione and other persons he proposed to employ to operate the station pursuant to the consulting agreement. In those meetings, they had extensive discussions regarding station programming, personnel, advertising policies and finances as well as other administrative matters. After discussions with Mr. Mangione, Mr. Gaines approved WCBM Maryland's plan for getting the station fully operational including the format, budget and personnel (Gaines Ex. 1, pp. 5-6; WCBM Ex. 3, p. 2). Additionally, he interviewed Joe Lombardo, Frank Luber, Tom Marr and Lee Case who would be working for WCBM Maryland. Mr. Gaines was very impressed with these individuals and liked them. He also knew that Frank Luber and Joe Lombardo had been in the radio business for a long time (Tr. 168-72).

13. Under the terms of the consulting agreement, WCBM Maryland agreed to operate WCBM on the Receiver's behalf and subject to his control (Gaines Ex. 1, p. 5). Upon approval of the consulting and assignment agreements by the Circuit Court for Baltimore County, WCBM Maryland, under the consulting agreement and subject to Mr. Gaines' supervision and ultimate authority, assumed responsibility for the day-to-day operations of WCBM (Gaines Ex. 1, pp. 5-6).

14. In a November 1988 meeting at the station, Mr. Gaines sat down with Mr. Mangione and told all of the station employees that he was the Receiver, that WCBM was his station and that they were running it for him. He made it clear to everyone at the meeting who he was and what he was doing. Mr. Mangione also made it clear that Mr. Gaines was the Receiver and licensee -- the person who was in charge of the entire operation (Tr. 322-23). Gaines believed that he hired the whole group of

individuals with broadcast experience and wherewithal as his consultant (Tr. 483). Gaines gave a broad direction to the WCBM Maryland people that he wanted a talk show covering a broad range of subjects of interest to residents of the area. He did not discuss specific programs (Tr. 77, 397). The format which he established in the beginning has not changed (Tr. 478).

15. The station was to run a talk show format directed at a certain segment of the listening audience. Mr. Gaines has monitored the station to ensure that the format has been carried out. The station's advertising policies are related to the format. Those policies have remained in effect and have been carried out (Tr. 477-78). He has conferred regularly with representatives of WCBM Maryland. Mr. Gaines has reviewed financial information and operational reports (Gaines Ex. 1, p. 6). Mr. Gaines has received Issues/Programs lists; he has read everything that came across his desk and he has about 10 boxes of files concerning the station (Tr. 73-4, 76, 88). Mr. Gaines has conferred with WCBM Maryland regarding programming matters and has vetoed programming that he did not believe to be appropriate (Gaines Ex. 1, p. 6). All of the programs on the Issues/Programs lists comport with his understanding of what WCBM Maryland would program (Tr. 77-8).

16. Mr. Gaines also involved himself in the station budgetary process in November 1988 because he is ultimately accountable as a fiduciary and receiver to the station's creditors (Tr. 137). He worked with Ed Watt, who was functioning as the accountant for WCBM Maryland and also with Mr. Mangione to plan the budget for 1989. Mr. Gaines approved the budget (Tr. 126, 594). Mr. Gaines also had a long meeting in November 1988 in which a traffic reporting system was discussed and he made the decision that WCBM should have such a system. He signed a contract relating to a helicopter (Tr. 99-101). Mr. Gaines received a copy of the 1990 budget which carried out the policies set up in the fall of 1988 (Tr. 127-28). He testified that the budget for 1990 followed in the footsteps of the budget for 1989 (Tr. 138). Mr. Gaines has received financial reports for WCBM in 1990 (Tr. 141), and between late March 1989 and January 1, 1990 he received many verbal reports (Tr. 144). Gaines' paralegal had a great deal of contact with WCBM Maryland. She maintained all of the financial records of the Receivership (Tr. 458-59).

17. Mr. Gaines instituted the station's EEO program. In connection with his law practice he has personally done a lot of EEO work and he is very sensitive to that issue. Mr. Gaines made sure that ads were placed in a Baltimore newspaper that had a Black readership and he discussed the necessity of attempting to recruit minorities for the station. He testified that since April 1989 WCBM has advertised for employees in newspapers with minority circulation (Tr. 353-54). Mr. Gaines has delegated responsibility for compliance with the EEO program to WCBM Maryland (Tr. 362). Mr. Gaines also provided an Employee Manual prepared in 1988 or 1989 to Mr. Mangione or Mr. Lombardo and directed that they determine how it could be used at the station. The station temporarily adopted an Employee Manual in 1989 patterned after a manual Mr. Mangione had used for another company after Mr. Mangione consulted with Mr. Gaines (Tr. 365, 367; 687; MVB Ex. 29).

18. An advertising policy for WCBM was established in November 1988 and has not changed. Mr. Gaines has had continuing involvement in this policy (Tr. 388). He is aware that there have been barter and trade agreements in force at WCBM since March 1989 and station staff have called him to discuss barter agreements (Tr. 395).

19. Since November 1988, WCBM Maryland has purchased additional equipment for the station. Mr. Gaines was involved in discussions about the equipment. Most of the equipment purchased before the end of February 1989 was to facilitate the talk show format and Mr. Gaines obtained Metromedia's permission for improvements to the premises to accommodate the new equipment (Tr. 392-93). WCBM Maryland has also consulted with Mr. Gaines about the purchase of equipment for the station since March 1989 (Tr. 394).

20. When the purchase of WCBM could not be consummated by February 28, 1989, as originally anticipated, Mr. Gaines agreed with WCBM Maryland that it should continue to operate the station under the same terms and conditions of the consulting agreement while he, WCBM Maryland, and Metromedia worked out terms to extend the various agreements. Mr. Gaines did not tell Mr. Mangione or anyone else at WCBM Maryland that he wanted the consultant to cease broadcasting, nor did he authorize anyone to do so on his behalf. He said that any such statement would have been in contravention of his obligations as Receiver. Mr. Gaines said that it was in the best interest of the Receivership, the creditors of Magic 680, and the public for WCBM Maryland to continue to broadcast so long as it was willing and able to do so (Gaines Ex. 1, pp. 6-7).

21. On March 18, 1989, Gaines left the country for a vacation. While he was gone, an attorney representing Metromedia contacted Howard Rubenstein, who was acting as counsel to the Receivership, and told him that it was canceling Gaines' sublease of the transmitter site and his lease of its other assets (MVB Ex. 36). Metromedia demanded immediate possession of the WCBM studio and transmitter site. Gaines was inaccessible. Unable to discuss this unexpected matter with Gaines, Rubenstein informed an attorney for WCBM Maryland that the consulting agreement was canceled and that he should immediately surrender the premises to Metromedia. Metromedia also demanded directly of WCBM Maryland that it vacate the premises (Gaines Ex. 1, p. 7; Tr. 555-7).

22. On or about March 24, 1989, WCBM Maryland's chief engineer, Fred Klimes, acting at the direction of Rubenstein who was acting as attorney for Gaines attempted to shut down the station. Klimes was prevented from closing down the station by Mangione and others acting on his behalf. Police were called to the station to restore order (MVB Ex. 24, p. 14). The station continued to operate and Klimes was told to leave the premises. After this incident, Mangione's attorney, DiPasquale, made the decision to fire Klimes because he and Mangione could no longer trust Klimes. Gaines acquiesced in the decision to terminate Klimes. He later told Klimes that he supported Mangione's decision (Tr. 159-62, 682-3).

23. WCBM Maryland refused to vacate the station premises because it claimed that it was legally entitled to remain on the property. Although the sub-sublease for the property provided that it would expire on February 28, 1989, Mangione understood that he would have until five days after FCC approval of the sale of the station to settle.

and that extensions of the lease would be granted through that time (Tr. 659, 378-9). Although Metromedia had sued WCBM Maryland to eject it from the premises, WCBM Maryland continued to operate the station.

24. Upon his return, Mr. Gaines was very disturbed at the events that had taken place and so informed Mr. Rubenstein (Tr. 430-31). Although Mr. Rubenstein has been involved in receiverships previously, he is a bankruptcy lawyer with no experience in FCC law (Tr. 472-73). Mr. Gaines took Mr. Rubenstein to task because he did not believe Mr. Rubenstein acted in the best interests of the Receivership (Tr. 436). He also advised Mr. Mangione that he had verbally repudiated Rubenstein's notice (Tr. 430-32). Although Mr. Gaines was told by Metromedia that his agreements had expired, he knew that WCBM Maryland had a separate contract with Metromedia to acquire a real estate leasehold interest in the site that he was not a party to and he told Mr. Mangione that if he wanted to stay on the property under claim of right that was fine (Tr. 431-32). Mr. Gaines and Mr. Mangione agreed to continue to perform in accordance with the terms of the consulting agreement (Gaines Ex. 1, p. 9).

25. Gaines states that he was forced to go along with Metromedia's attempt to eject WCBM Maryland because of his tenuous position as court appointed receiver. Gaines believed that he no longer had a right to the possession of the premises, but that if his consultant, WCBM Maryland, believed that it had a right to possession of the premises he would be pleased to have them remain and continue broadcasting.

26. On April 21, 1989, Gaines filed a "Cross Complaint by Bennett G. Gaines and Request for Interlocutory Relief" in Federal Court in Baltimore in conjunction with the action brought by Metromedia seeking to evict WCBM Maryland from the station premises (Tr. 427-8). Gaines joined in that proceeding strictly at Metromedia's insistence and only to avoid liability to that creditor, to which he owed a fiduciary duty. Metromedia, in fact, drafted the court documents. Gaines had a contract with Metromedia to use the station facilities, and when Metromedia canceled that contract, he could not longer use those facilities. However, WCBM Maryland has a separate contract with Metromedia and as long as it was able to retain possession of the station premises under its independent claim, Gaines has encouraged WCBM Maryland to continue broadcast operations pursuant to the Receivership's license.

27. According to Mr. Gaines, since February/March 1989, he has had a *de facto* agreement with WCBM Maryland which is an actual verbal agreement that Mr. Gaines considers binding (Tr. 466-67); WCBM Ex. 4). He testified that the *de facto* agreement regarding the operation of WCBM is evidenced by performance (Tr. 387). Furthermore, Mr. Gaines stated that the only material difference that occurred in the operation of the consulting agreement was a change in the manner in which the payroll is handled (Tr. 387-88). Mr. Gaines was in regular contact with representatives of WCBM Maryland up until the time he left the country, and he continued to confer with the consultant to supervise the operation of the station upon his return and even while the court case in which he was a nominal plaintiff was pending. Mr. Gaines subsequently advised Metromedia that, notwithstanding his nominal position in the court case, he would not take any action through the FCC or otherwise that would impair his right to rely on WCBM Maryland in the operation of the station (Gaines Ex. 1, pp. 9-10). Since the federal court case was dismissed, Mr. Gaines has not taken the position, even nominally, that WCBM Maryland's operation of the station is in any way improper.

28. The record shows that Gaines has not been involved with the operation of the station on a day-to-day basis (Tr. 1212). Gaines has not visited the station on a regular basis, generally, only every couple of months. However, he has met with Mangione, Luber and Lombardo many times and talks with Mangione and his attorney with great regularity (Tr. 103-8). Gaines was involved in a few hiring decisions. For instance, he checked out Les Kinsolving before allowing WCBM Maryland to hire him (Tr. 78-81, 606). Gaines also had some say in the hiring of Michael Hodes (Tr. 81-4). Mangione also got Gaines' approval before hiring Myron Laufer as the station's general manager and later consulted with Gaines before firing Laufer (Tr. 598, 611-15, 151). In general, Gaines is not involved in the hiring and firing of station employees (Tr. 151-2, 673, 698-700). However, Gaines believes that by hiring the consultant to run the station, he retained control in hiring key personnel (Tr. 168-9, 482).

29. After establishing the basic station programming format in October 1988, Gaines has had little involvement in the day-to-day programming decisions (Gaines Ex. 1, p. 6; Tr. 457, 100-1, 1226-8). Gaines has received monthly programming reports but not necessarily on a regular basis (Tr. 110-11, 423-5). Gaines did not direct that quarterly issues and programs lists be kept by station personnel, although he has seen some of the lists (Tr. 73-5, 418). In general, he relied on station employees to be responsible for specific programming decisions within the format guidelines he had established (Tr. 123, 1195, 1202, 1210, 1225).

30. Gaines was not involved in the budget process for 1990 because the policies that he had set in 1988 were being carried out (Tr. 597). Since WCBM Maryland was responsible for paying all expenses, it did not really matter to Gaines what the specific budget items were or how much individual employees were paid (Tr. 127-8, 139, 163-8, 456, 481). Gaines did receive financial reports although he generally did not have many questions about the finances (Tr. 141-50, 403). Prior to the attempted shut down of the station in March 1989, Gaines signed station payroll checks and filed tax returns. After that incident virtually all such obligations were turned over to WCBM Maryland (Tr. 153, 326, 342-3, 648-9, 655). The Receivership has not bought any equipment for the station while WCBM Maryland has purchased new telephones and computers and has done substantial renovations to the studios (Tr. 393-5, 405, 659, 705-6).

31. Some station employees, such as Laufer and Bernard McCain, apparently were not told prior to being hired, that Gaines was the licensee and that WCBM Maryland was operating the station pursuant to a consulting agreement (Tr. 1312-4, V8-608-9, V8-626-7, V8-640). Later, however, they learned that Gaines was the licensee and receiver (Tr. 1328, 1335-7, V8-614, V8-619). Both Laufer and McCain thought that Mangione was the person making decisions at the station, although they did not know whether he was consulting with Gaines about such decisions (Tr. 1361, 1368, 1371-3, 1379, V8-648-9, 1193).

Site Availability Issue - Mount Vernon

32. At the time MVB filed its application on September 1, 1988, Richard V. Falcon, principal of MVB, specified the present WCBM site pursuant to the Commission's *Cameron* doctrine.[2] Falcon did not attempt to find any other site before filing his application and he did not have any cost figures on the use of the site from Metromedia. From the time he filed MVB's application to the present, Falcon has believed that the present WCBM site would be made available to him if his construction permit application was granted (MVB Ex. 4, p. 1; Tr. 864-6). Falcon had talked with Gaines and Tom Randa, local counsel for Metromedia, prior to September 1, 1988. Falcon was told by Randa that Metromedia had an oral agreement with Mangione concerning the site and therefore would not negotiate with Falcon (Tr. 863, 865, 964-6).

33. After filing the MVB application, Falcon received a letter dated October 26, 1988, from Metromedia signed by Dennis Codlin. The letter stated that Falcon did not have reasonable assurance of the availability of the WCBM transmitter site. Around this same time, Falcon was also told by Gaines, Randa and Dougherty that the WCBM site would not be available to him. Falcon thought that the letter from Codlin was part of an attempt to get MVB's application dismissed. While Falcon continued to rely on the *Cameron* doctrine he also began to look for other transmitter sites (Tr. 896-9).

34. In the late summer or early fall of 1988, Falcon hired David Steele, an experienced consulting engineer, to advise him and assist him in efforts to find an alternative site. Falcon considered a number of potential sites but was unable to come up with any property that was both available and suitable from an engineering standpoint. Falcon met with Steele several times but because of the technical constraints on the WCBM antenna array, they were unable to locate any suitable property (MVB Ex. 4, p. 1; Tr. 897-902, 945).

35. In the spring of 1989, Metromedia's agreement with WCBM Maryland expired and Metromedia began seeking to have WCBM Maryland ejected from the property. Although Metromedia still would not deal with Falcon he believed that Metromedia would eventually agree to make the site available to MVB (MVB Ex. 4, pp. 2-3).

36. Falcon became aware that the Commission intended to do away with the *Cameron* doctrine. The *First Report and Order* in BC Docket No. 81-742, 4 FCC Rcd 4780, was released May 16, 1989, and became effective August 7, 1989. Applicants had until September 6, 1989, to amend their applications (Tr. 894-5). In the late summer and early fall, Falcon continued his efforts to locate an alternative site. He terminated Steele and hired a new consulting engineer, Carl Lamm. However, most of the work was done by Lamm's partner, William Suffa (Tr. 919-20, 923). In addition, at about the same time Falcon asked Tony Cornias, a title searcher, to get a list of available properties in an approximate two mile radius of the WCBM site. Falcon was told by Steele and Suffa that the two mile radius was necessary in order to use the present tower array and meet the technical requirements for this station (Tr. 838, 909). Cornias gave the information he gathered to Falcon who then gave the information to his associate, Leslie Pladna. Falcon also hired Samuel T. Daniels to determine who owned the identified properties. Falcon and Pladna used this information to contact the site owners to determine whether they would be interested in selling their property (Tr. 835-40, 948-9, 956).

37. Because of technical considerations relating to protection of other stations and coverage of Baltimore, the search was restricted to a section northwest of the city (Tr. 1084-5). In that area, there were relatively few parcels of land large enough and configured properly to accommodate the required array of antenna towers. Most of those parcels proved to be unavailable. For example, the McDonough School, an exclusive private preparatory school, was not interested in having radio towers on its property. The same was true of the Baltimore Colts Training Facility and the Green Spring Valley golf course (MVB Ex. 4, p. 3; MVB Ex. 4, pp. 7-37). Any site that was available and might possibly work, was presented to the consulting engineers for their opinion. They rejected all of the sites proposed, for reasons such as power lines running through the property. However, some sites which were technically acceptable were rejected for other reasons (Tr. 1166-7). They also considered diplexing with other radio stations. The only such site that even came close to being worthy of consideration from a technical standpoint was radio station WCAO, which is also located in northwestern Baltimore County. Even though the engineers said that it was problematic at best, Falcon talked to an employee of WCAO about diplexing. Falcon was told that WCAO would not be interested because of the technical difficulties that diplexing would cause for both stations (MVB Ex. 4, pp. 3-4; Tr. 1096-1100).

38. By the fall of 1989, Falcon had concluded that the present WCBM site was the only feasible location for this station. This was based on his inability to find another suitable site. In addition, Falcon believed that local legislation relating to wetlands and critical areas, along with increasingly restrictive attitudes on the part of the local zoning authorities made development of a new site for a multi-tower directional array in the suitable area extremely problematic. Falcon believed that this legislation precluded redevelopment of the present WCBM property as a whole for anything other than the grandfathered broadcast use. Finally, Falcon believed that certain provisions in documents filed in the court proceedings stemming from Metromedia's effort to oust WCBM Maryland from the site required that the property be used only for broadcasting (MVB Ex 4, p 4).

39. On the September 6, 1989, deadline for applicants to submit statements of reasonable assurance of the availability of their proposed sites, MVB, instead, filed a Request for Declaratory Ruling. In that pleading MVB took the position that Metromedia would have no choice but to make the site available to MVB if it were the successful applicant in this proceeding. Falcon did not know how much the site would cost to buy in September 1989, although he had some estimates on substitute antennas. MVB continued to specify the WCBM site while a waiver of the *Cameron* policy was sought (Tr. 913, 916, 927-8).

40. In approximately October 1989, Falcon had a conversation with Dennis Codlin of Metromedia where in Codlin told him that Metromedia would make the property available to Falcon on essentially the same terms as it would make it available to Mangione. Codlin said that Metromedia would deal with anyone who would pay their price but he would not put the statement in writing or give Falcon a specific price (MVB Ex. 4, pp. 5-6; Tr. 920-1). Because Falcon believed the Metromedia site was

available, he stopped looking for other sites (Tr. 921). Between September 1989 and November 1990, Falcon relied on Codlin's verbal assurance that the Metromedia site would be available (Tr. 1020-1, 1045).

41. It wasn't until shortly before Falcon's September 12, 1990, deposition that he was finally able to obtain a price from Metromedia for the purchase of the property. This came about after Falcon called Metromedia's local counsel, Larry Greenwald. Greenwald was eventually able to tell Falcon that Metromedia's asking price was $2.8 million. This occurred on or about September 10, 1990 (MVB Ex. 4, p. 6; Tr. 968-72).

42. After his deposition, Falcon asked Greenwald to have Metromedia put into writing its expression of willingness to make the site available to MVB. Marvin Diamond, Metromedia's communications counsel, drafted the letter concerning site availability (MVB Ex. 3; Tr. 973-5). Although the letter is not legally binding, Falcon thought that it gave him reasonable assurance of the availability of the site. Falcon believed that Metromedia owned the underlying fee to the land and could now either sell or lease the property to him. No dollar amount is stated in the letter (Tr. 978-80, 1014, 1045-7).

Financial Qualifications Issue - Mount Vernon

43. In its initial application, Mount Vernon did not provide an affirmative response to the financial certification question. MVB's hesitation in certifying was based on the refusal of Bennett Gaines and Metromedia to discuss with Mount Vernon the terms upon which the transmitter site and equipment would be made available to it. *See* MVB's Application, Form 301, §III.

44. On September 6, 1989, MVB filed an amendment which consisted of a declaration by Mr. Falcon, in which he stated that he had been unable to negotiate with the owner of his specified site. However, he said he had net liquid assets in excess of $1,100,000, which exceeded his *bona fide* estimate of the cost either to lease the existing physical facilities of WCBM(AM), or to construct a substitute directional antenna facility, and to operate the station for three months without advertising revenue. *Memorandum Opinion and Order*, FCC 91M-432, released February 5, 1991.

45. On September 26, 1990, MVB filed an amendment certifying that it had obtained reasonable assurance that the existing WCBM(AM) site would be available to it and that it was financially qualified. The amendment included a letter from Performance Mortgage Company ("Performance") which expressed the willingness of Performance to extend to MVB a line of credit up to $2.8 million for the construction (including site acquisition) and initial operation of the WCBM(AM) facilities (MVB Financial Ex. 4.).

46. When Falcon learned that Metromedia was asking $2.8 million for the property in September 1990, he contacted Charles Bittle at Performance about a loan to be used for the site acquisition, construction and operation. Falcon understood that Metromedia's asking price covered everything that was on the property. However, Falcon thought that he would be able to acquire the property for less than its asking price (Tr. 976-7, 981, 1025, 1029, 1032).

47. According to Bittle, he first met with Falcon in July 1990 to discuss a loan for MVB to acquire the WCBM site. Bittle says he went to Falcon's office in July and that Falcon had the appraisal for the property as well as a *pro forma* business proposal. Bittle also met with Falcon in early September (Tr. 1864-8). Falcon says that he had no specific discussions with Bittle about the radio project until September 9 or 10, 1990. Falcon also met with Bittle after Falcon's deposition on September 12, 1990. The Performance letter is dated September 12, 1990 (MVB Financial Ex. 4; Tr. 2377, 2385-6).

48. Falcon gave Bittle a *pro forma* financial proposal which included estimated costs and expenses for items such as salaries, staff, programming, interest, depreciation, taxes and estimated income and earnings and a bottomline. Neither Bittle nor Falcon can locate the *pro forma* (Tr. 2374, 2380-1, 2338, 1869-71). Bittle was also shown a copy of the appraisal for the Metromedia property. Bittle remembered it as being an appraisal for a radio station although the appraisal clearly states that the highest and best use of the property is not for broadcasting (Tr. 1872-7). Falcon doesn't believe that he showed Bittle the appraisal until sometime later, although they did discuss the appraisal and the property (Tr. 2392-3). Bittle says that he saw Falcon's financial statement and thought that his net worth was substantial (Tr. 1879-80). Falcon says that Bittle saw his financial statement in connection with an earlier project (Tr. 2394-5). Falcon also says that Bittle was given Falcon's handwritten notes on cost estimates (Tr. 2391).

49. After talking to Falcon, Bittle called up several lenders to see if they were making commercial loans. The only lender he found making commercial loans was Citibank. He talked to a commercial lending officer, whom he did not know, and relayed the information provided to him by Falcon. Based on the information that he gave to Citibank over the phone, they said that it sounded like a viable loan that they would do at that time (Tr. 1897-1901). Based on this conversation and a subsequent telephone conversation with Citibank that lasted a total of 10 minutes, Bittle prepared the Performance letter (Tr. 1902).

50. In Bittle's view the Performance letter means that based on the information given to the potential lender, he thinks it is a viable deal. It is not a commitment letter (Tr. 1890-1). The statement in the letter that Performance will be willing to establish a line of credit is not true because Performance only brokers commercial loans. In that regard, Performance and Bittle had only ever brokered one other commercial loan (Tr. 1881-1891-2,1894). Bittle says that Falcon knew that Performance was merely brokering the loan (Tr. 1897). The statement in the Performance letter about "our prime rate" was also not accurate because Performance didn't have a prime rate (Tr. 1894).

51. There was no discussion with Citibank about what down payment, if any would be required (Tr. 1903). Bittle testified that normally a lender such as Citibank would need additional information before it would ever make a loan. This information was never provided to Citibank (Tr. 1861-2, 1871, 1913). Indeed, Bittle never gave Citibank Falcon's name (Tr. 1904).

52. The Performance letter is the only such reasonable assurance letter Bittle or Performance has ever done for a commercial loan (Tr. 1852). However, Bittle has done similar letters for residential purchases (Tr. 1860). While Bittle says that he got a sample letter or outline from Falcon's counsel, he also says that he wrote 90 percent of the letter himself (Tr. 1892), 1908-11). Bittle did not have

authority to approve loans (Tr. 1853). Finally Bittle did not know how much the ultimate loan would be because the lender would decide that after it got all the necessary information (Tr. 1901). In this case, no information was actually sent to the lender (Tr. 1923).

53. By letter dated November 27, 1990, and signed by Barbara Summers, vice president, Performance withdrew its previous bank letter citing the lack of any investor interest in financing a loan to MVB (WCBM Ex. 12). Falcon saw this letter for the first time on November 30, 1990, during his testimony in this proceeding (Tr. 1036-7). Falcon later confirmed Performance's change in intentions by contacting Bittle and Summers in December 1990 (MVB Financial Ex. 1, 2).

54. Even without the financing from Performance, Falcon believed that he was financially qualified based on a lease of the Metromedia property (MVB Financial Ex. 1, p. 2). Falcon claims that leasing the WCBM site and facilities was always an option that he had considered. (Tr. 2349; MVB Financial Ex. 15). However, when Falcon obtained the purchase price for the property from Metromedia he never inquired about a lease price (Tr. 2354). Moreover, when MVB filed its amendment with the Performance letter, it stated that since the cost to purchase exceeded the original cost estimates, it was relying on the Performance letter for its financing (Tr. 2389). The amendment did not say anything about leasing the property. In any event, in September 1990, Falcon's intent was to buy the property (Tr. 2349).

55. The November 9, 1990 letter from Metromedia provided that Metromedia would negotiate a transaction whereby Falcon would be entitled to the "use and occupancy" of the WCBM site (Tr. 2279). However, prior to that date, Falcon had never discussed a lease arrangement with Metromedia and has never gotten an amount that it would cost to lease the site (Tr. 2277), 2281-2, 2291, 2352); Declaration of Richard V. Falcon dated September 5, 1989 and attached to Petition for Leave to Amend, filed by Mount Vernon Broadcasting on September 6, 1989.

56. Although Metromedia was asking $2.8 million for the property in September 1990, Falcon did not believe it would actually cost that much to acquire the property. Thus, he thought that he could use some of the $2.8 million loan from Performance to pay for the initial operating expenses of the station. If the full $2.8 million price was required by Metromedia, Falcon intended to rely on his own personal assets to cover operating expenses (Tr. 2260-1, 2265, 2269, 2426, 2437-8). Falcon has estimated his costs to operate the station for the first three months as $180,000 (MVB Financial Ex. 1, p. 8). Falcon has net liquid assets in excess of $1 million (MVB Financial Ex. 2 and 3).

57. After the financial issue was added against MVB in February 1991, Falcon began seeking other sources of financing. He had discussions with Maryland National Bank and Delmarva Trust in February and March (MVB Financial Ex. 1, p. 3; Tr. 2355-7). Also in March, Falcon began discussions with Joel Fedder about acquiring the site where the towers are located. Those discussions involved Fedder either using his personal funds or financing the purchase (MVB Financial Ex. 1, p. 3; Tr. 1691-3, 1695, 2358). Fedder also thought that he would be able to purchase the property for less than the $2.8 million asking price, but would be willing to pay that amount. Fedder intends to develop part of the property not used by the WCBM operation (Tr. 2157, 1712, 1715, 1732, 1745-6). Fedder sent a letter to Falcon dated April 9, 1991, in which he confirmed his willingness to make $2.8 million available to Falcon to purchase the property or alternatively for Fedder to purchase the property and lease it to Falcon for $10,000 per month (MVB Financial Ex. 6; Tr. 1730-1). Fedder has a net worth of over $12 million (MVB Financial Ex. 7).

Standard Comparative Issue - WCBM Maryland, Inc.

Applicant Ownership and Structure

58. WCBM Maryland is a for-profit corporation organized under the laws of the State of Maryland. On November 17, 1988, WCBM Maryland filed an FCC Form 314 application requesting Commission approval of the assignment of the license of Station WCBM(AM), Baltimore, Maryland from Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc. to WCBM Maryland (WCBM Ex. 1).

59. Nicholas B. Mangione is President and director of WCBM Maryland and owns 100 percent of its issued and outstanding stock. Joseph Lombardo is Vice President and a director of the applicant. Linda Mangione, the daughter of Nicholas B. Mangione, is Secretary/Treasurer of WCBM Maryland and is also a director. Louis and John Mangione, sons of Nicholas B. Mangione, are also directors of WCBM Maryland (WCBM Ex. 1).

Diversification of Media Interests

60. Neither WCBM Maryland, Nicholas B. Mangione, nor any of the other officers and directors have any ownership interest in or control over any media of mass communications (WCBM Ex. 1).

Integration - Quantitative

61. Nicholas B. Mangione, President, Director and 100 percent shareholder of WCBM Maryland, will work full-time forty or more hours per week as Station Manager of Station WCBM(AM) in the event of a grant of WCBM's FCC Form 314 application to acquire WCBM(AM). As Station Manager, he will be responsible for overseeing station operations, including oversight of the programming, news and public affairs, traffic and engineering departments. In addition, he will be involved in the planning and implementation of station policy and will fully participate in decisions to hire and fire employees (WCBM Ex. 2, p. 1; Tr. 620, 715).

Integration - Qualitative

Local Residence

62. Nicholas B. Mangione was born in Baltimore, Maryland and has lived there his entire life. He presently resides at 2514 Proctor Lane, Baltimore (County), Maryland where he has lived for approximately fourteen years. His present home is only a few (two or four) miles outside of the Baltimore city limits and six to eight miles from station WCBM(AM) (WCBM Ex. 2, p. 1; Tr. 541, 712). He previously resided at 3902 While Avenue, Baltimore (City), from 1960 to 1976. Prior to that he lived at 4115 Mary Avenue, Baltimore (City) from 1950 until 1960. All of his residences before 1950 were also in the city of Baltimore. He has lived his entire life within the

service area of Station WCBM(AM). He intends to continue to reside within the service contour of Station WCBM(AM) (WCBM Ex. 2, pp. 1-2).

Civic Activities

63. Mr. Mangione is a member of the Board of Directors of the Associated Italian American Charities, Baltimore, Maryland, an organization in which he has been active for twenty-five years. He has also been a member of the Italian American Civic Club, Baltimore, Maryland for twenty-five years and was formerly President of the Club. At the present time he is Co-Chairman of the Board of Directors. He has been a member of the Order Sons of Italy, Dulaney-Towson Lodge, for thirty years (WCBM Ex. 2, p. 2).

64. Mr. Mangione has been a member of the Appian Society for approximately 20 years. He has been a committee member of the Baltimore Regional Burn Center Foundation, Inc. for about 5 years, and has been a member of the Howard County Community Association since 1978. He served a 1 or 2 year term as a member of the Baltimore City School Board in the early 1970's. He is a member of the Catholic War Veterans (WCBM Ex. 2, p. 2).

65. Mr. Mangione attends the functions of and contributes funds to the following organizations, and has been involved for approximately the time periods indicated:

- Loyola College (15 years)
- St. Agnes Hospital (10 years)
- Grant-A-Wish (10 years)
- Order Sons of Italy (25 years)
- Associated Italian American Charities
- Italian American Civic Club
- La Dolce Vita (10 years)
- Baltimore Cancer Society (10 years)
- St. Leo's Building Fund (4 years)
- St. Anthony's Building Fund (25-30) years)
- St. Isaac Jogues Building Fund (14 years)
- Palatine Fathers
- Fallston General Hospital Chapel (constructed and donated in memory of Luigi and Maria Mangione in 1974)
- Cerebral Palsy (7 years)
- Christopher Columbus Piazza (assisted in construction)
- University Hospital (12 years)
- Baltimore Museum of Art (20 years)
- Walters Art Gallery (12-15 years)
- Mercy High School (21 years)
- American Heart Association (12 years)
- Archbishop Borders Trust Fund (2 years)
- Shrine Circus (20 years)
- Boys Town of Jerusalem (2 years)
- Maryland Special Olympics (10 years)
- Maryland Public Television (5 years)
- Maryland Institute of Art (5 years)
- Baltimore Symphony (5 years)
- Morris Mechanic Theater (12-15 years)
- Center Stage Theater (12-15 years)
- Baltimore Opera (12-15 years)
- American Committee on Italian Migration (ACIM) (20 years)

(WCBM Ex. 2, pp. 2-3; Tr. 514-29). All of the above activities are within the service area of WCBM (Tr. 710)

Broadcast Experience

66. Nicholas Mangione has been working at Station WCBM(AM) from October 19, 1988 to the present as Station Manager pursuant to the Consulting Agreement between Bennett Gilbert Gaines, Interlocutory Receiver from Magic 60, Inc. and WCBM Maryland. Under the supervision of Bennett Gilbert Gaines, the Receiver, he managed to resurrect the station from a satellite-music operation to a full-fledged operation with a talk radio format (WCBM Ex. 2, p. 4).

Auxiliary Power

67. Mr. Gaines and Mr. Mangione both testified that WCBM Maryland has auxiliary power (Tr. 455-56, 711). The emergency power is tested often (Tr. 711). Mr. Mangione proposes to use the same facilities if WCBM Maryland is granted the license (*Id.*).

Mount Vernon Broadcasting

Quantitative Integration

68. Richard V. Falcon, is the sole owner and President of Mount Vernon Broadcasting, a sole proprietorship which is seeking authority for an AM radio station on 680 kHz at Baltimore, Maryland, the facilities presently used by AM station WCBM (MVB Ex. 1).

69. Mr. Falcon proposes to be integrated fully into the management of the station (MVB Ex. 1; Tr. 850, 853). He will serve full time, at least forty hours per week, as the station's General Manager, with overall supervision of all aspects of its construction and operation, including administrative, programming, business and technical area (MVB Ex. 1, p. 1; Tr. 1004-05). He will have ultimate authority for the formulation of station policy and budget controls (MVB Ex. 1 p. 1).

70. Mr. Falcon is presently engaged in the practice of law, but proposes to give up his law practice and arrange his civic responsibilities so as to devote full time to the position of General Manager at the radio station (MVB Ex. 1, p. 1; Tr. 853).

71. Mr. Falcon is Hispanic. His father was born in Key West, Florida, and his mother was Puerto Rican (MVB Ex. 1, p. 2).

72. Mr. Falcon has resided within the city limits of Baltimore continuously since 1970 when he moved from Florida (MVB Ex. 1, p. 1). His present home address is 1033 St. Paul Street in Baltimore (Tr. 812). Mr. Falcon will continue to reside in Baltimore should MVB be awarded the construction permit (*Id.*).

73. Mr. Falcon has been active in a number of civic activities in Baltimore and within the service area of the station (MVB Ex. 1, p. 2). He was an original member of the Special Committee on Hispanic and Latin Lawyers of the Maryland State Bar Association, which was formed in the summer of 1988 (*Id.*). This committee attempts to sensitize the bar to Hispanic issues, puts on Law Day programs in high schools with large numbers of Hispanic students, and is working to have Spanish translators placed in the Baltimore courts for defendants who do not speak English (MVB Ex. 1, pp. 2-3). The committee also helps place Hispanic social organizations in touch with Hispanic lawyers who are interested in doing *pro bono* work for them (MVB Ex. 1, p. 3).

74. Mr. Falcon was a member of the Attorney Grievance Commission of the Maryland State Bar from the late 1970's to the early 1980's. He subsequently served as a panel member of the Commission for several years (MVB Ex. 1, p. 3).

75. Mr. Falcon was a member of the Corporate Banking and Bankruptcy Committee of the Maryland State Bar Association for approximately twelve years (MVB Ex. p. 1, p. 3). Mr. Falcon will resign from this committee, and all other law-related activities, once his application for the WCBM facilities is granted (*Id.*).

76. Mr. Falcon sat on the Attorney Advisory Panel of the Baltimore Chapter of the Maryland American Civil Liberties Union, which screens proposed cases, from the mid-1970's to the early 1980's (MVB Ex. 1, p. 3).

77. Mr. Falcon has performed substantial *pro bono* work for the American Civil Liberties Union and the National Association for the Advancement of Colored People ("NAACP") (MVB Ex. 1, p. 3). His association with the NAACP goes back to 1972, when he was lead counsel for a landmark school desegregation case in the State of Maryland (MVB Ex. 1, pp. 3-4). Mr. Falcon has also advised both organizations on voting rights matters (MVB Ex. 1, p. 4).

78. From about 1978 to about 1983, Mr. Falcon was a member of the Board of Directors of the Park Heights Street Academy (MVB Ex. 1, p. 4); Tr. 856-857). The Academy was a private school for students who dropped out of the public schools in Baltimore (*Id.*). Its purpose was to get those student back to school to complete their high school work and prepare them for advanced education (MVB Ex. 1, p. 4). The vast majority of the students were Black and from impoverished backgrounds (MVB Ex. 1, p. 4).

79. In addition Mr. Falcon has been active on various political committees, such as a committee to elect a minority judge to the Circuit Court of Baltimore City and a campaign committee for a mayoral candidate in Baltimore in 1983 (of which he was co-chair) (MVB Ex. 1, p. 4). He was also an active member of the campaign for a congressional candidate in Baltimore and adjacent Catonville (the 7th Congressional District of Maryland) in 1986 (MVB Ex. 1, p. 4).

80. Neither Mount Vernon Broadcasting nor Mr. Falcon has any interest in any medium of mass communications[3] (MVB Ex. 1, p. 5). Mr. Falcon serves as outside general counsel to Career Communications, Inc. which holds conferences and publishes a placement office giveaway for Black and Hispanic engineering students (*Id.*). As part of his responsibilities as general counsel, Mr. Falcon sits on the Board of Directors (Tr. 842, 858). This is not a media interest. Further, Mr. Falcon will resign as general counsel if awarded the license (MVB Ex. 1, p. 5).

Auxiliary Power

81. MVB proposes to install an auxiliary power source at the station's transmitter site and studio (MVB Ex. 2).

CONCLUSIONS OF LAW

Unauthorized Transfer of Control

82. Section 310(d) of the Communications Act of 1934, as amended, prohibits the transfer of licenses or permits without prior Commission approval. The recipient of the authorization is required to exercise *de facto* control and ultimate authorization over station performance. *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 51 RR 2d 1474, 1476 (Rev. Bd. 1982), citing *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir.) *cert. denied*, 383 U.S. 967 (1966).

83. The Commission has often recognized that there is no exact formula by which control of broadcast authorization can be determined. To ascertain whether a transfer of control has occurred, the Commission traditionally looks beyond the legal title to determine whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See, WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although, in most instances, the question of control involves an issue of fact that must be resolved by examining the specific circumstances, the Commission nevertheless has established specific guidelines in this area, focusing on control of the station's finances, personnel and programming. *See, News International, PLC*, 97 FCC 2d 349, 358 (1984). Additionally, while the Commission requires that the licensee retain ultimate responsibility for station performance, professional service contracts which vest substantial operational authority in management employees have been permitted in the past. *See, Blue Ribbon Broadcasting, Inc., supra*; *Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972). Moreover, although the Commission has advised prospective purchasers and their principals to refrain from day-to-day participation in station affairs during the pendency of their application, these purchasers have been allowed such involvement under the supervision of court appointed Trustees in Bankruptcy, so as to assure continuation of service. *See, Phoenix Broadcasting Co.*, 44 FCC 2d 838, 840 (1973).

84. The record indicates that, upon assuming Receivership of Magic 680, the license of WCBM, Mr. Gaines immediately took action to return the station to the air. Not being a broadcaster, Mr. Gaines initially hired staff which had formerly worked at the station to operate the station. Mr. Gaines understood that it was his fiduciary duty to arrange for the orderly disposition of the assets of the Receivership for the benefit of creditors, and to preserve and protect the licensee by operating the station in the public interest pending consummation of a transfer of the license and other assets to a qualified buyer.

85. When he restored station operation in August of 1988, Mr. Gaines discussed with the staff and established the basic operating guidelines for the station and then

allowed the staff to operate the station within the guidelines that he had set. Subsequently in WCBM Maryland, he found a buyer who was willing to operate the station pending Commission approval of the transfer of control. It was crucial for Gaines to find a buyer who would provide funds for the operation of the station, otherwise Gaines would have been forced to discontinue operation because the Receivership lacked funds for station operation. Gaines entered into a consulting agreement with WCBM Maryland in October of 1988 after the agreement was filed with the Commission. Management arrangements similar to the management agreement between WCBM Maryland and Gaines have previously been allowed. *See, J. Christopher Robinson, Trustee in Bankruptcy, WLVG*, 2 FCC Rcd 1365 (1987). At the very outset of WCBM Maryland's consultancy, Gaines had extensive discussions with Mangione and the other people from WCBM Maryland regarding station programming, personnel, advertising policies, as well as other administrative matters. Mr. Gaines approved the proposed WCBM Maryland operational plan, but make it clear he was the Receiver and licensee and therefore in charge of the entire operation. The consultation agreement spelled out that ultimate control of the station was with Gaines.

86. The record indicates that after WCBM Maryland assumed control Gaines reviewed financial information and operational reports. His paralegal has maintained all of the financial records of the Receivership. Gaines was involved with planning and/or approving the station's budget. He discussed expenditures of equipment and signed contracts. He interviewed persons Mangione proposed to employ to operate the station. He approved the station's format and monitored the station to ensure that the approved format has been carried out. He received and reviewed WCBM issues and program lists and has vetoed programming he believed to be inappropriate. Gaines also established the station's public file and instituted the station's EEO program.

87. In sum, the evidence establishes that Gaines has lawfully delegated responsibility for day-to-day operations of WCBM Maryland under the consulting agreement, but that he has continuously exercised ultimate control over WCBM's finances, personnel, programming and other aspects of station operation throughout the term of his Receivership.

88. The incidents of March 1989 have no significant material bearing on Gaines' control of the station's operation. Gaines sought to accommodate Metromedia in its eviction attempt of WCBM Maryland solely to avoid liability as the Receiver. The record reflects that WCBM Maryland has at all times continued to operate the radio station at the request of Gaines and under his ultimate control. The unauthorized transfer of control issued **IS RESOLVED** in favor of Gaines and WCBM Maryland.

Site Availability Issue - Mount Vernon

89. MVB specified in its application the current WCBM site relying on the then extant *Cameron* doctrine which established a presumption of the availability of the site of an existing licensee. Subsequently, however, Metromedia, the site owner, advised MVB that the site would not be available. Additionally, the Commission rescinded the *Cameron* doctrine and required pending applicants to amend their applications to specify new sites for which they had reasonable assurance by September 6, 1989. MVB sought a waiver to the Commission's ruling claiming that the present WCBM site was the only feasible site for the station. However, even as it awaited Commission action MVB made concerted efforts to find another suitable location for use as a transmitter site. In searching for an alternate site, MVB examined many parcels and spend thousands of dollars in the process. By the time the Commission denied MVB's request for a waiver, MVB had received an oral assurance from Metromedia in October of 1989 that it would make its site available to MVB on similar terms as it was making the site available to WCBM Maryland.

90. It is deemed that Metromedia's oral offer of October 1989 constituted requisite reasonable assurance of site availability to MVB. Reasonable assurance does not require a legally binding commitment and find details may be worked out in the future. *National Innovative Programming Network, Inc. of The East Coast*, 2 Rcd 5641 (1987). It is sufficient if there is a meeting of the minds resulting in some firm understanding as to the site's availability. *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988). The short time lapse between September 6, 1989 and October of 1989 when MVB received oral reasonable assurance of site availability is not deemed decisionally significant. MVB has demonstrated that it made a serious and costly search for an alternate even though it strongly believed that the WCBM site would have be be available to it. The site availability issue designated against MVB **IS RESOLVED** in its favor.

Financial Issue - Mount Vernon

91. Initially MVB certified its financial qualification in an amendment filed prior to the issuance of the *HDO*. The certification was based on Falcon's assertion that he has net liquid assets in excess of $1,100,000 which exceeds his estimate of the cost to either lease the existing physical facilities of Station WCBM or to construct a substitute directional antenna facility and operate the station for three months without reliance on advertising revenue. No documentation was submitted and none was required.

92. On September 26, 1990, MVB filed an amendment to its application to provide financial and transmitter site information set forth in the Declaration. In his Declaration Falcon averred that he has attempted for some time to enter into negotiations with Metromedia "to lease or acquire" the transmitting facilities of WCBM, and that it wasn't until about September 11, 1990 that he was advised that "Metromedia would be willing to make the transmitter site property, studio building, towers and all other transmitting studio and office equipment available to MVB for the sum of $2.8 million. Falcon stated further that although the ultimate negotiated purchase price may be less, he was supplying documentation of his wherewithal to meet the $2.8 million asking price." The documentation consisted of a purported commitment letter (dated September 12, 1990) from a financial institution, Performance Mortgage Company, in the amount of $2.8 million. Subsequently, Performance revoked its commitment. As we will see below, MVB later acquired financial backing from one Joel Fedder. However the question of *bona fides* of the Performance letter has to be resolved. It is Commission policy that not only must an applicant currently have reasonable assurance of financing, such reasonable assurance must also exist at the time the applicant certifies as to its financial qualifications. *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990). Moreover, initial financial qualifications are a critical ingredient in a

good cause showing for a financial amendment, and in the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions for leave to amend financial proposals will be disallowed. *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991); *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2843 (1990).

93. The Performance letter must be deemed to be even less than an accommodation letter. Performance simply did not have the capability to make a loan of $2.8 million. Performance's Bittle admitted at hearing that his letter was not a commitment letter. Bittle acted as a broker. The only lender that Bittle contacted which expressed any interest in the loan was Citibank but Citibank never saw any of the financial data from Falcon. *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd*, 6 FCC Rcd 1893 (1991) has set down guidelines to determine whether a given financial proposal constitutes reasonable assurance of committed sources of funds. MVB has failed to meet any of these guidelines, which the Commission has deemed essential aspects of reasonable assurance of committed sources of funds. The most that can be said of Performance's posture is that it speculated that MVB might be able to secure a $2.8 million loan, but that did not constitute reasonable assurance.

94. MVB has maintained in its Proposed Findings that, Performance's revocation of its loan commitment notwithstanding, MVB has been at all times financially qualified because it relied on its fall-back position of leasing the Metromedia property. MVB overstates its position. It was not until its November 9, 1990 letter that Metromedia indicated its willingness to lease its property as well as sell it. Prior to September of 1990, Metromedia would not deal with MVB to either sell the property or lease it, as the declarations of Falcon attest. *See* Declarations dated September 5, 1989[4] and September 26, 1990. Falcon avers in his September 26, 1990 Declaration that Metromedia was now willing to sell the property for the sum of $2.8 million. He speculated that he might be able to buy it for less, but that he was willing to meet the $2.8 million offer. No mention was made of any lease proposal. The record is devoid of any demonstrative evidence showing that Metromedia prior to November 9, 1990 agreed to lease property to MVB. The aspect of MVB's financial qualification which was based on leasing the property from Metromedia (according to the September 5, 1989 Declaration) was based on speculation.

95. In view of the foregoing, it is ruled that on September 26, 1990 MVB was financially unqualified. MVB at that point in time relied on the Performance letter. It had no other basis for reliance. However, the Performance letter does not constitute the requisite reasonable assurance.

96. *MVB's April 22, 1991 amendment regarding financial qualification.* By petition filed April 22, 1991, MVB sought to amend its application to reflect a new source of financing. Ruling on the amendment was held in abeyance pending receipt of Proposed Findings. Inasmuch as MVB's proposed amendment was not filed as a matter of right it is incumbent on MVB to show good cause. The crucial element of good cause here is diligence. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). MVB learned late in November, 1990 that it could no longer rely on the Performance commitment letter. The record indicates that Falcon took no concrete steps to secure alternate financing until the issue was designated in February, 1991. He did not secure a commitment until April 9, 1991, and did not file an amendment until April 22, 1991. Waiting some four and a half months to cure a basic qualification defect cannot be deemed due diligence. *See, Kelly Broadcasting System Corporation*, 4 FCC Rcd 6563 (1990); *Edwin A. Bernstein, supra.* Moreover, by virtue of not having reasonable assurance of its financing when it amended its application in September 1990, MVB lacks a "critical ingredient" in a good cause showing for the acceptance of a further financial amendment. *See, Aspen FM, Inc., supra.* Additionally, the late filing proved to be disruptive. Many changes were noted between the proposal as stated in the amendment and the testimony at hearing. No attempt has been made to correct the amendment and the amendment must be disallowed. MVB's April 22, 1991 Motion to Amend **IS DENIED.** In view of this, there is no need to consider MVB's most recent financial proposal. The financial qualification issue specified against MVB **IS RESOLVED AGAINST IT; MVB IS DEEMED** to be financially unqualified.

Standard Comparative Issue

WCBM Maryland, Inc.

97. The record indicates that WCBM Maryland is entitled to 100 percent full-time integration credit for its proposal to integrate into management its sole principal Nicholas Mangione on a 40 hours per week basis. WCBM's integration proposal is substantially enhanced by Mangione's long-term residence and his civic activities. WCBM Maryland is also entitled to a slight preference for its proposal to maintain the auxiliary power facility presently available to WCBM.

Mount Vernon Broadcasting

98. MVB is entitled to 100 percent quantitative integration credit for its proposal to integrate into management on a full-time basis its sole principal Richard Falcon. There is nothing in the record that belies Mr. Falcon's pledge to terminate the practice of law and become fully engaged as General Manager of the proposed station. His integration proposal is substantially enhanced by his long-term local residence, civic activities and minority status. Additionally, MVB is entitled to a slight preference for its proposal to install auxiliary power facilities.

ULTIMATE CONCLUSIONS

99. MVB has been found to be financially unqualified and for this reason its application must be denied. There is no impediment to the grant of the renewal of the license and subsequent assignment to WCBM Maryland.

Accordingly, **IT IS ORDERED** that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application for renewal of license filed by Gaines **IS GRANTED;** the application of Mount Vernon Broadcasting **IS DENIED;** and the assignment of license from Gaines to WCBM(AM) Baltimore, Maryland **IS GRANTED**[5]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] References to WCBM Maryland Exhibits are cited as WCBM Ex. _____.

[2] *George E. Cameron, Jr., Communications*, 71 FCC 2d 460 (1979), established the presumption that the licensed transmitter site would be available to a challenger in a comparative renewal proceeding.

[3] As reported in the Amendment filed April 5, 1991, Mr. Falcon reported that he had acquired shares of stock in certain public corporations which do not exceed 1/180th of one percent of the shares outstanding these corporations. Such infinitesimal holdings are not considered by the Commission in divestiture.

[4] A Declaration of Richard V. Falcon dated September 5, 1989 and attached to Petition for Leave to Amend, filed by Mount Vernon Broadcasting on September 6, 1989.

[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Telephone
Services, Inc.,
Complainant,

v. File No. E-91-055

GTE Southwest
Incorporated,
Defendant.

ORDER

Adopted: March 11, 1992; Released: March 19, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On February 6, 1991, National Telephone Services, Inc. (hereinafter "NTS") filed the above-captioned formal complaint against GTE Southwest Incorporated (hereinafter "GTE") seeking recovery of damages for GTE's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On February 25, 1992, GTE filed an answer and a motion to dismiss stating that NTS was not an interstate access customer of GTE during the relevant time period. On March 9, 1992, NTS filed a motion for leave to withdraw the complaint.

2. In its motion, NTS stated that it is unable to locate any record of purchases from GTE during the relevant time period, that its present employees do not have actual knowledge of such purchases, and that it concludes that GTE's denial of purchases is most likely correct. Based on the foregoing, NTS stated that it is not necessary to continue this proceeding.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that NTS' Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief, Operations
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Teton Communications Incorporated — File No. 63500-92-5-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station KNKD736 in the Public Land Mobile Services at Idaho Falls, Idaho

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 12, 1992; Released: March 19, 1992

By the Commission:

1. On October 23, 1984, the Commission granted Teton Communications Incorporated (Teton) authority to construct and operate base station facilities for station KUKD736 on frequency 152.09 MHz at Idaho Falls, Idaho. Having authority to construct, Teton then could provide service to the public upon notifying the Commission of the completed construction on FCC Form 489. Teton constructed the facilities and commenced operation prior to the October 23, 1985 expiration date of the construction permit without filing FCC Form 489 notifying the Commission of completion of construction of the Idaho Falls facilities. By letter dated June 27, 1991, the Chief, Mobile Services Division, notified Teton that its authorization for the station KUKD736 had expired.[1] On July 26, 1991, the Commission received from Teton a request for Special Temporary Authority (STA) to continue to operate station KNKD736 pending Commission action on an application for reinstatement of the expired authorization, filed with the STA request.[2]

2. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Teton commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or if any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Teton's operation of the facility until July 26, 1991, constitutes willful and repeated conduct within the terms of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending*, the base forfeiture amount for failing to file required forms is $30,000. Consistent with this *Policy Statement*, we are adjusting downward the amount to $15,000 because failing to file an FCC Form 489 is a relatively minor violation.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Teton Communications Incorporated IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Fifteen Thousand Dollars ($15,000) for willful and repeated violations of the aforementioned rule until July 26, 1991. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Common Carrier Bureau also listed on public notice Teton's authorization as expired. *See Public Notice*, Mimeo No. 13752 (released July 1, 1991).

[2] Teton states that although it believed it had timely filed a notice of completion of construction, it could not find a copy in its files. There is no FCC Form 489 in the Commission's files. In a separate submission, Teton has requested reconsideration of the determination that its authorization expired. Teton's deleted authorization was reinstated as of September 30, 1991. *See Public Notice*, Mimeo No. 20112 (released Oct. 8, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Satellite, Inc. — File Nos. 4/5-DSS-EXT-90

For Extension of Time to Construct and Launch Space Stations in the Domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1992; Released: March 20, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. National Exchange Satellite, Inc. (NEXSAT) requests extensions of time in which to construct and launch its SpotNet satellites.[1] General Instrument Corporation (GIC) opposed a number of these requests[2] and NEXSAT replied.[3] For the reasons set forth below, NEXSAT's requests are denied.

II. BACKGROUND

2. In November 1988, NEXSAT was authorized to construct and launch its SpotNet-1 and SpotNet-2 satellites, and to construct a ground-spare, SpotNet-3.[4] NEXSAT subsequently filed requests for orbital reassignment of its SpotNet-1 and -2 satellites, which were granted in January 1990.[5] The *Authorization Order* required NEXSAT to implement its satellites in accordance with the following milestone schedule:

Satellite	Commence Construction	Complete Construction	Launch
SpotNet-1	August 1989	January 1993	March 1993
SpotNet-2	July 1990	July 1993	September 1993
SpotNet-3	January 1991	January 1994	ground spare

The *Authorization Order* further stipulated that if these deadlines were not met or extended by the Commission for good cause shown, the authorizations would become, by their own terms, null and void.[6]

3. In February 1990, NEXSAT requested,[7] and was subsequently granted,[8] extensions of its milestone commitments. In this First Request, NEXSAT asserted that it was impossible to make commitments regarding construction of its satellites until the Commission had acted on its request for orbital reassignment. The Bureau specifically rejected these arguments but granted the First Request because of NEXSAT's possible confusion about implementation of its milestone schedule while its reassignment request was pending. At that time, the Bureau further ordered NEXSAT to submit "copies of its construction contracts with the spacecraft manufacturer, including any relevant amendments and notices to proceed no later than October 31, 1990 for SpotNet-1 and no, later than March 31, 1991 for SpotNet-2."[9] The Bureau stated that "failure to respond within this time frame will subject the authorizations for these satellites to revocation."[10]

4. On the eve of the expiration of its revised construction commencement date for SpotNet-1, NEXSAT filed another request for an "extension of time in which to file construction contracts" for its SpotNet satellites.[11] In this Second Request, NEXSAT states that because of the unique nature of the SpotNet payload, its negotiations with potential manufacturers have been far more detailed and complex than is common when contracting for more conventional spacecraft. Further, NEXSAT asserts that the public interest will be served by granting its request because NEXSAT, as a new entrant to the satellite communications field, will encourage advances in state-of-the-art satellite communications and will add diversity to what NEXSAT characterizes as a shrinking field of existing satellite service providers. Accordingly, it requests that the commencement of construction deadlines for SpotNets-1, -2 and -3 be extended until April 1991, March 1992 and September 1992, respectively.

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[1] NEXSAT has requested four extensions of its milestone commitments. *See* paras. 2-6, *infra*.

[2] GIC has filed several Oppositions to NEXSAT's Requests (Opposition to Request for Extension of Time (December 14, 1990), Opposition to Request for Extension of Time (March 18, 1991) and Motion for Leave to Supplement Opposition (April 15, 1991)) in which GIC urges us to deny NEXSAT's extension requests or, alternatively, to grant NEXSAT's requests with the condition that its authorizations be subject to the outcome of the Commission's disposition of GIC's petition seeking a change in the Commission's orbital spacing policy from 2^0 to 3^0. The disposition of NEXSAT's requests are made in accordance with established domestic fixed-satellite policies. The spacing issues raised by GIC have already been considered by the Commission in another proceeding (RM-7627, RM-7628) and will not be addressed herein. *See* FCC 92-1, released January 15, 1992.

[3] Reply to Opposition (April 5, 1990).

[4] National Exchange Satellite, Inc., 3 FCC Rcd 6992 (1988) (*Authorization Order*).

[5] Assignment of Orbital Locations to Space Stations in the Domestic Fixed Satellite Service, 5 FCC Rcd 179 (1990). SpotNets-1 and -2 were respectively assigned to the 93^0 W.L. and 127^0 W.L. orbital locations.

[6] *Authorization Order* at para. 8.

[7] Letter from Counsel, NEXSAT to Chief, Domestic Facilities Division, February 22, 1990 (the First Request). Although NEXSAT was originally required to commence construction of SpotNet-1 in August of 1989, its First Request for an extension of this deadline was not filed until February 1990.

[8] Letter from Chief, Domestic Facilities Division to Counsel, NEXSAT, June 7, 1990 (the June 7th Letter).

[9] *Id.* at 4. The commencement deadline for SpotNet-3 was unchanged.

[10] June 7th Letter, note 8, *supra*.

[11] Request for Extension of Time, October 31, 1990 (the Second Request).

5. While Commission action was pending on this Second Request, NEXSAT filed a "redacted" copy of a contract with TRW, Inc. Space Technology Group (TRW) dated February 21, 1991. This contract authorized TRW to complete, by August 1991,[12] an in-depth design study of NEXSAT's latest technical proposal to launch four single-band satellites instead of the two hybrids originally planned. "Assuming the success of that study," NEXSAT was allowed 21 days thereafter to accept or reject TRW's proposal.[13] In conjunction with the filing of this contract, NEXSAT requested a third extension of its milestone schedule (the Third Request). While the exact dates upon which NEXSAT therein proposes to meet its milestones are not clear, it appears that construction of SpotNet-1 would commence on March 1, 1992.[14] NEXSAT seeks this third extension to "facilitate the continued development" of its SpotNet system.

6. NEXSAT's latest extension request (the Fourth Request) was filed on January 6, 1992. The company has recently been engaged in discussions with the EDSAT Institute (EDSAT), which has studied the needs of the national educational community for transponder capacity. EDSAT concludes that there should be at least one dedicated national satellite network to meet educational needs. Toward that end, NEXSAT and EDSAT have initiated a joint feasibility study of the technical and economic merits of the potential use of the SpotNet system to meet EDSAT's requirements. Accordingly, NEXSAT now requests "an additional 12 to 18 months" within which to complete this joint feasibility study and to either "(1) begin construction of the first of the SpotNet satellites, or (2) if need be, submit an application to the Commission seeking to modify the SpotNet construction permit in order to conform system design to EDSAT requirements and/or TRW's recommendations."[15]

7. Nexsat has not withdrawn any of its extension requests and it is still possible for the company to meet certain deadlines proposed in each. We will therefore consider herein the Second, Third and Fourth Requests.

III. DISCUSSION

8. The milestone schedule which is included in every space station authorization issued by the Commission is designed to assure that licensees are moving forward with the construction and launch of their systems in a timely manner. Requiring licensees to make and fulfill realistic construction and launch commitments prevents increasingly scarce orbital locations from being "warehoused" by licensees. Such warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by other entities willing and able to proceed immediately with the construction and launch of their satellite systems.[16] Efficient management of the orbit spectrum resource also requires that licensees implement their plans in an orderly manner.[17] Accordingly, extensions of the milestone schedule are granted only when delay in implementation is due to circumstances beyond the control of the licensee.[18]

A. Second Request

9. In support of its Second Request, NEXSAT initially notes that it will require additional construction time "within which to resolve the difficult technological issues" inherent in what it describes as its state-of-the-art satellite proposal. While NEXSAT would like more time to examine and ultimately to determine the best technology to pursue, such business concerns are not beyond an applicant's control and thus are not valid bases for an extension of time to commence construction of a satellite.[19]

10. NEXSAT further alleges that the public interest requires a grant of its extension request in order to assure that a "meaningful" amount of competition exists in the satellite communications marketplace.[20] It presents no evidence, however, that strict enforcement of milestone schedules impairs the opportunity for new entrants, such as NEXSAT, to compete, or in support of its veiled contention that active competition does not presently exist in the domestic fixed-satellite service. Indeed, the Commission's "open skies" policies are designed to encourage participation by all qualified entities in the provision of competitive satellite communications services.[21] However,

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[12] On September 17, 1991, NEXSAT notified the Commission that the deadline for completion of this design study had been extended by the parties until October 31, 1991. That study has been completed. *See* Letter from Counsel, NEXSAT to Secretary, Federal Communications Commission, January 6, 1992.

[13] Article 17, TRW Contract. NEXSAT does not argue that this contingent contract is sufficiently binding to satisfy its commencement of construction commitments. *See, e.g.*, Letter from Chief, Domestic Facilities Division to Hughes Communications Galaxy, Inc. (June 7, 1990) (non-contingent construction contract fulfills construction commencement condition in satellite license).

[14] *See* Exhibit C of the TRW Contract.

[15] Request for Extension of Time, January 6, 1992 (the Fourth Request) at 2.

[16] MCI Communications Corporation, 2 FCC Rcd 233.

[17] Given the rapidly changing technology in the satellite industry and the uncertainty of traffic growth projections over time, the Commission does not even consider applications for either replacement or expansion satellites that are not intended to be launched promptly. *See, e.g.*, Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990), at n.44; Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at n.43 and para. 28.

[18] MCI Communications Corporation, *supra; see also* Hughes Communications Galaxy, Inc. 5 FCC Rcd 3423, 3424 (extensions of milestone schedules generally granted only when delay in implementation due to circumstances beyond the control of the licensee).

[19] *See, e.g.*, American Telephone and Telegraph Company, *supra*, at 5591 (economic considerations and business judgments are not circumstances beyond a licensee's control); MCI Communications Corporation, *supra*, at 234. *See also P&R Temmer*, 743 F.2d 918 (1984) (licensee proposing innovative technology bears risk that it will be unable to meet authorization conditions if technology fails to perform as hoped).

[20] In its Second Request, NEXSAT states that "[a]fter a series of mergers and acquisitions", AT&T, Hughes, GE Americom and GTE control most of the C-band and Ku-band orbital positions.

[21] We have, for example, limited to two the number of initial orbital assignments available to each licensee. Additional locations are assigned to existing licensees only upon a showing that in-orbit satellites are essentially filled and that an additional

given the limited availability of domestic fixed-satellite C- and Ku-band orbital locations, mechanisms have been adopted to assure that orbital locations are not held by entities who are not able to proceed promptly with the implementation of innovative satellite systems. These mechanisms, however, do not inhibit new entry. They merely insure the timely availability of proposed services. NEXSAT itself is a prime example of the continued ability of new entrants to seek and receive domestic fixed-satellite licenses. While market forces may have promoted acquisitions and mergers resulting in the consolidation of some space station licensees, such consolidation has not been shown to be the result of restrictive Commission licensing policies, nor to be contrary to the public interest.

11. Both new entry and the innovative service that it may promote are of little public value if the proposed satellite services are not predictably and promptly made available. The strict enforcement of milestone schedules, which will insure this availability, imposes no greater burden on new entrants than it does on existing service providers; an applicant's plans, and its ability to implement those plans, are expected to be carefully considered prior to the application process. In sum, we have no reason to believe that active competition does not currently exist in, nor do we believe that our decision today will have a chilling effect on continued open entry into, the domestic fixed-satellite service. On the other hand, public policy concerns regarding spectrum warehousing and the prompt availability of proposed satellite services support the continued enforcement of our milestone deadlines. We accordingly cannot find that the grant of NEXSAT's Second Request for an extension of its milestone commitments is in the public interest.

B. Third Request

12. In support of its Third Request for extension, NEXSAT submits that it needs additional time to make a "choice of conventional technology versus new, but potentially quite beneficial, technology."[22] As discussed above,[23] this decision is wholly within NEXSAT's control and does not therefore justify an extension of the company's milestone commitments.

13. NEXSAT argues further that the facts in Hughes Communications Galaxy, Inc. (*Hughes*), *supra*, are analogous to its own and thus support its request for extension. Contrary to NEXSAT's analysis, however, neither the facts nor the underlying rationale of *Hughes* support a grant of its request. In *Hughes*, the licensee had originally been authorized to construct and launch two single-band satellites. The implementation dates for these satellites were not identical. Accordingly, when the licensee later proposed to construct a hybrid satellite, it requested that the implementation schedules be synchronized to allow the hybrid to be constructed and launched in accordance with the original milestones for the Ku-band satellite, not the C-band satellite. Since the C-band satellite was to have been completed earlier than the Ku-band satellite, this amounted to a request for an extension of time in which to construct and launch the C-band payload. Noting the Commission's desire to encourage the use of economically efficient hybrids whenever possible, the Bureau specifically rejected allegations that the licensee in *Hughes* was attempting to warehouse its C-band location. Because the implementation dates for the single-band satellites did not coincide, an extension for one "half" of the hybrid was necessary. The licensee in *Hughes* was also required to commence construction of its satellite immediately upon grant of its extension request, so there could be no undue delay in implementation.[24]

14. Here, NEXSAT is contemplating the construction of four satellites in place of its two originally-proposed hybrids. Unlike the situation in *Hughes*, this change is not technologically dependent on a revision of the milestone schedules. NEXSAT further does not propose to begin construction immediately. Rather, under the terms of its arrangement with TRW, NEXSAT has not committed itself to proceed with construction at any specified time or with any particular technology, and is free to decide to proceed in a different fashion, or, indeed, not to proceed with implementation at all.

15. NEXSAT nonetheless contends that public policy concerns support a grant of its Third Request. It states that the NEXSAT/TRW developmental efforts should lead to the introduction of technologies that could significantly change satellite communications to the benefit of the public, which would enjoy higher quality, less expensive services.

16. As NEXSAT correctly points out, "[r]apid technological advances...have marked the period since 1974, when the first commercial domsat was orbited."[25] Clearly, technological advancement is a desirable goal,[26] and one that has been encouraged through the Commission's "open skies" policies. It is equally clear, however, that the Commission's adoption and enforcement of its milestone deadlines has not precluded technological improvements. As discussed at paragraph 10, *supra*, our procedural mechanisms are designed to assure that orbital locations are held only by entities who are willing and able to implement their often innovative proposals.

17. NEXSAT finally argues that grant of its Third Request will not lead to the exclusion of others who would use these locations. However, the locations assigned to both SpotNet-1 and SpotNet-2 allow for 50-state coverage. Should these locations become available, it is unlikely that they will remain unutilized by either new applicants or current licensees seeking orbital reassignment. If they do remain vacant, of course, NEXSAT may reapply for these locations, or it may resubmit its application for other available locations when it is ready and able to implement its system.

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orbit location is needed to satisfy firm customer growth requirements. *See Domestic Fixed-Satellite Service - Orbit Deployment Plan*, 84 FCC 2d 584, 603 (1981).

[22] Reply to Opposition, *supra*.

[23] *See* para. 9, *supra*.

[24] Hughes actually had begun construction of its satellite pursuant to a Section 319(d) waiver.

[25] Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1468 (1984).

[26] *See* 47 U.S.C. § 303(g).

C. Fourth Request

18. In support of its Fourth Request, NEXSAT alleges that the extension sought will allow it to explore the merits of attempting to develop a satellite system in conjunction with EDSAT. EDSAT's goal of developing a comprehensive, predictable and affordable satellite communications system to meet the needs of the national educational community appears to be highly laudable. We encourage EDSAT's continued efforts to assess its needs and to secure a system that is best suited to meet those needs. To the extent that NEXSAT, or any other space segment provider, is ultimately chosen by EDSAT to provide the desired service, we will make every effort to accommodate the parties' needs at the time a tangible proposal is before us.[27] However, under our long-standing policies, we cannot allow NEXSAT to continue to delay implementation of its satellite system based upon speculation that it may be selected to implement the EDSAT network. NEXSAT originally committed to commence construction of its first satellite nearly two and one-half years ago. Now it seeks an 18-month further delay in the commencement of construction, while giving no assurance that it will ever construct its authorized system. As discussed at paragraphs 8 and 9, *supra*, such commercial and technical considerations are wholly within the control of the applicant and thus do not support a further extension of NEXSAT's milestone commitments.

IV. CONCLUSION

19. NEXSAT has not shown that either precedent or policy supports a grant of its extension requests. On the other hand, there are compelling reasons to deny these requests. If the broadly stated desires to provide state-of-the-art technological services, or to examine potential commercial applications of a system, were sufficient to support an extension of milestone schedules, any applicant could successfully argue that its deadlines should be delayed. Thus, there would no longer be any meaningful assurances that satellite systems would ever be implemented. This is precisely the type of situation that we intend to proscribe. Accordingly, we cannot find that the public convenience and necessity will be furthered by the grant of NEXSAT's Requests.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that the requests of National Exchange Satellite, Inc. for an extension of time in which to construct and launch space stations in the domestic fixed-satellite service ARE DENIED.

21. IT IS FURTHER ORDERED, pursuant to Section 0.291 of the Commission's rules on delegations of authority, that the authorizations granted to National Exchange Satellite, Inc. in National Exchange Satellite, Inc., 3 FCC Rcd 6992 for the SpotNet-1, SpotNet-2 and SpotNet-3 satellites ARE DECLARED NULL AND VOID.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[27] As discussed at para. 17, *supra*, NEXSAT is free to reapply for these same, or other available, orbital locations at such time as it is ready and able to implement its system.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-544

In the Matter of

Amendment of Section 73.202(b),	RM-7527
Table of Allotments,	RM-7615
FM Broadcast Stations.	
(Thief River Falls[1]	
and Walker, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 9, 1992; Released: March 20, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6706 (1990), proposing the substitution of Channel 256C1 for Channel 256C2 at Walker, Minnesota, and modification of the license for Station KLLZ-FM[2] to specify operation on Channel 256C1. The *Notice* was issued in response to a petition filed by Thomas E. Ferebee ("petitioner").[3] Petitioner filed comments restating his interest in Channel 256C1 at Walker. Olmstead Broadcasting, Inc. ("Olmstead"), filed a counterproposal.[4] Petitioner and Olmstead filed reply comments.

2. In its counterproposal, Olmstead requests the substitution of Channel 257C2 for Channel 257A at Thief River Falls, Minnesota. Olmstead further requests the modification of its license for Station KKDQ(FM) to specify operation on Channel 257C2 in lieu of Channel 257A. Olmstead stated its intention to file an application for Channel 257C2 and believes the proposed allotment to Thief River Falls would be in the public interest as it will provide an additional wide area service to the community.

3. In reply comments, petitioner continues to support the allotment of a C1 channel to Walker. According to petitioner, there is a greater public need for the upgrade of a class C2 to class C1 station at Walker than there is for the upgrade of a class A to a class C2 station at Thief River Falls.

4. A staff engineering analysis indicates that Channel 256C1 can be substituted for Channel 256C2 at Walker, Minnesota, at petitioner's proposed site or Channel 257C2 can be substituted for Channel 257A at Thief River Falls, Minnesota. However, both channel upgrades cannot be granted in compliance with the Commission's spacing requirements. Thus, we must choose between the conflicting proposals and base our decision on the following allotment criteria as set forth in *Revision of the FM Policies and Procedures*, 90 FCC 2d 1988 (1982):

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[co-equal weight given to priorities (2) and (3)]

Our engineering analysis indicates that neither upgraded station would provide first or second full-time aural service. Since both communities have existing AM and FM stations, neither proposal will provide a first local service under priority three.[5] In view of the foregoing, we believe it is appropriate to base our determination on which modification proposal should prevail under priority four of the allotment criteria. This priority permits the Commission to compare the extended service areas provided by each proponent. We conducted our own engineering and population analysis of the proposals to determine which proposal could provide a new service to the largest population within the gain area of the predicted C2 and C1 service contours. *See Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987); *aff'd in relevant part*, 4 FCC Rcd 3843 (1989); *aff'd in relevant part*, 6 FCC Rcd 1493 (1991); *appeal dismissed sub nom. WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (September 26, 1991).

5. After consideration of the results of our analyses, we conclude that the Walker proposal should be adopted. Both proposals could provide a new service to residents within their predicted gain areas and both proponents have indicated a need for a new service. However, as noted above, both communities cannot have the requested upgrade. We believe our decision, based on a comparison of the population within the predicted gain areas, will bring the benefits of a new service to a greater number of people. A comparison of the population totals indicates that adoption of the Walker proposal would result in service to an additional 34,009 persons, while adoption of the Thief River Falls proposal would result in service to an additional 28,859 persons. Therefore, the counterproposal filed by Olmstead Broadcasting, Inc. to substitute Channel 257C2 for Channel 257A, Thief River Falls,

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[1] The community of Thief River Falls has been added to the caption.

[2] The call sign was changed from KLLR-FM to KLLZ-FM effective July 14, 1991.

[3] At the time the *Notice* was issued Station KLLZ-FM (formerly KLLR-FM) was the subject of a pending application for assignment of license from Thomas E. Ferebee to Sioux Valley Broadcasting (referred to as Ingstad Broadcasting). Consequently, Ingstad Broadcasting joined Thomas E. Ferebee in filing the petition for rule making along with comments and reply comments. Assignment of the license was consummated on June 1, 1991.

[4] Public Notice of the counterproposal was given on February 7, 1991, Report No. 1836 (RM-7615).

[5] We note that Walker is served by Stations KLLR(AM) and KLLZ(FM) while Thief River Falls is served by AM Stations KTRF and KKAQ and FM Stations KKDQ, KSNR and KNTN. Noncommercial educational Stations KSRQ and KQMN are also assigned to Thief River Falls.

Minnesota, shall be denied. We will allot Channel 256C1 to Walker, Minnesota, and modify the license for Station KLLZ-FM to specify operation on Channel 256C1.

6. Based on the above information, we believe the public interest will be served by the substitution of Channel 256C1 for Channel 256C2, Walker, Minnesota, in order to provide that community with its first wide area FM service. Channel 256C1 can be allotted to Walker in compliance with the Commission's minimum distance separation requirements at petitioner's specified site.[6] Since Walker is located within 320 kilometers (200 miles) of the U.S. Canadian border, concurrence of the Canadian government has been obtained for this allotment. We shall also modify the license for Station KLLZ-FM to specify operation on Channel 256C1 in accordance with Section 1.420(g) of the Rules.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Walker, Minnesota	256C1

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KLLZ-FM, Walker, Minnesota, IS MODIFIED to specify operation on Channel 256C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the counterproposal filed by Olmstead Broadcasting, Inc. (RM-7615) IS DENIED.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Dale R. Olmstead, President
Olmstead Broadcasting, Inc.
P.O. Box 218
Thief River Falls, Minnesota 56701

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sioux Valley Broadcasting Co., licensee of Station KLLZ-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[6] The coordinates for Channel 256C1 at Walker are 47-12-42 and 94-55-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-405

In the Matter of

Amendment of Section 73.202(b), RM-7232
Table of Allotments,
FM Broadcast Stations.
(Kindred and Oakes, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 10, 1992; Released: March 20, 1992

By the Acting Chief, Allocations Branch:

1. At the request of CERM Broadcasting Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 5413 (1990), proposing the substitution of Channel 224C3 for Channel 223C1 at Oakes, North Dakota, the reallotment of Channel 224C3 to Kindred, North Dakota, and the modification of Station KDDR-FM's license to specify Kindred as its community of license. Comments supporting the proposal were filed by the petitioner.[1] [2] No other comments were received.

2. The *Notice* requested that petitioner submit further information to demonstrate the public interest benefits which would accrue from the modification of Station KDDR-FM's license to specify Kindred instead of Oakes. The *Notice* pointed out that Kindred is substantially smaller in population than Oakes (569 persons vs. 2,030 persons, respectively) and that while the Kindred station would provide service to a greater population that presently possible, this increase was the result of the station's ability to serve the nearby, already well-served community of Fargo.[3] In response, petitioner states that the public interest would be served by providing Kindred with its first local aural transmission service. It states that Kindred, located 24 miles south of Fargo, is not part of the Fargo-Moorhead Urbanized Area but is instead independent of the larger community. In this regard, it submits that while Station KDDR-FM would provide some coverage to the Fargo-Moorhead Urbanized Area, it would not provide city-grade service to either Fargo or Moorhead. According to the petitioner, Kindred was incorporated in 1920 and has a city council form of government, with a mayor, aldermen, auditor-treasurer, police chief, Park Board members, Assessor and Judge. Petitioner submits that Kindred provides its residents with virtually all of its own municipal services, such as police and fire protection, garbage collection, cable television and electrical power service and public school system. In addition, it has its own churches and community organizations such as the Kindred Lions Club and the Kindred Area Merchants Association.

3. Petitioner states that over 60% of the Kindred adult population work in Kindred, according to a 1986 survey by the Cass County Extension Agent. Further, the community has its own local newspaper, *The Kindred Tribune*, which addresses local needs and interests and almost exclusively advertises Kindred and Kindred-area businesses. Petitioner does not believe that there is any significant advertising by Kindred area merchants in the Fargo media. Petitioner also points to the Kindred Area Rural Recovery Corporation which encourages industrial, commercial and retail growth and development of community resources within the city of Kindred and the surrounding area. Kindred has its own zip code, and the residents and businesses are listed separately in the telephone directory. Finally, petitioner notes that preliminary 1990 U.S. Census figures for Oakes indicate that the population has declined nearly 16% since 1980, from 2,112 persons to 1,775 persons.

4. We believe the public interest would be served by substituting Channel 224C3 for Channel 223C1 and reallotting the channel from Oakes to Kindred, North Dakota, since it could provide Kindred with its first local aural transmission service. We find that petitioner has provided sufficient information to determine that Kindred is an independent community with its own needs and interests, separate and apart from the larger community of Fargo. Indeed, we have confirmed that Station KDDR-FM, as a Kindred station, will not provide Fargo or Moorhead with a city-grade service. In addition, while Oakes' population has declined from 2,112 persons to 1,775 persons between 1980 and 1990, Kindred's population has remained stable. Finally, modifying Station KDDR-FM's license to specify Kindred will not deprive Oakes of its only local aural broadcast service as the community will continue to be served by fulltime AM Station KDDR(AM). Nor will it create any unserved or underserved areas. Channel 224C3 can be allotted to Kindred in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[4] As proposed, we will also modify

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[1] Petitioner's comments included a counterproposal requesting that Channel 223C1 be allotted to Ellendale, North Dakota, and Channel 247A be allotted to Oakes. However, after the close of the comment period, petitioner withdrew its intention to apply for the Ellendale and Oakes allotments. Therefore, these proposals need not be discussed.

[2] After the close of the comment period, petitioner filed supplemental comments addressing the merits of its proposal. We generally do not accept late-filed comments. However, the petitioner filed its petition for rule making pursuant to Section 1.420(i), this rule was clarified during the pendency of this rule making, and no opposition to the proposal was received. *See Modification of FM and TV Authorizations to Specify a New Community of License (Change of Community R&O)*, 4 FCC Rcd 4870 (1989), *recon. granted in part (Change of Community MO&O)*, 5 FCC Rcd 7094 (1990). Therefore, we believe the public interest will be served by acceptance of the supplemental comments.

[3] Petitioner estimated that Station KDDR-FM, if allotted to Kindred, would provide service to 123,336 persons within a 4,735 square kilometer area, but only 36,995 persons in a 16,343 square kilometer area would receive service if Station KDDR-FM remains allotted to Oakes, even assuming maximum Class C1 facilities.

[4] The coordinates for Channel 224C3 at Kindred are North Latitude 46-38-48 and West Longitude 97-00-54.

petitioner's license for Station KDDR-FM to specify Channel 224C3 at Kindred in lieu of Channel 223C1 at Oakes. Canadian concurrence in the allotment has been received since Kindred is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Kindred, North Dakota	224C3
Oakes, North Dakota	--

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of CERM Broadcasting Corporation for Station KDDR-FM, IS MODIFIED to specify operation on Channel 224C3 at Kindred, North Dakota, in lieu of Channel 223C1 at Oakes, North Dakota, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-310

In the Matter of

Amendment of Section 73.202(b), RM-7829
Table of Allotments,
FM Broadcast Stations.
(Fort Bragg, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1992; Released: March 20, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 6117 (1991), proposing the substitution of FM Channel 253B1 for Channel 253A at Fort Bragg, California, and modification of the license of Axell Broadcasting ("petitioner"), licensee of Station KSAY(FM),[1] to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 253B1, if allotted.[2] No other comments were received.

2. We believe the public interest would be served by substituting Channel 253B1 for Channel 253A at Fort Bragg since it could provide the community with an expanded coverage area FM service. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will modify herein the license of Axell Broadcasting, as requested. As stated in the *Notice*, Channel 253B1 can be allotted to Fort Bragg at the petitioner's presently authorized site,[3] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Fort Bragg, California	237A, 244B, 253B1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Axell Broadcasting for Station KSAY(FM), IS MODIFIED to specify operation on Channel 253B1 in lieu of Channel 253A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Axell Broadcasting, licensee of Station KSAY(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Petitioner is presently licensed on Channel 249A at Fort Bragg. However, it was ordered to relocate to Channel 253A to accommodate the modification of the license for Station KMGG(FM), Monte Rio, California. *See* 6 FCC Rcd 4852 (1991).

[2] Although petitioner's comments were late-filed, they were accompanied by a request for their acceptance. Petitioner states therein that its failure to file supporting comments earlier was not a willful disregard of the Commission's commitment requirements, but rather is attributable to its assumption that the expression of interest contained in the petition for rule making was sufficient to fulfill its obligations. While the Commission's Rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested, in this instance the comments serve to reaffirm petitioner's continuing interest in pursuing the modification proposal. Therefore, the comments have been accepted. We note that had this been a contested proceeding, we would not have accepted this untimely expression of interest.

[3] Coordinates used for Channel 253B1 at Fort Bragg are 39-28-03 and 123-45-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-53

In the Matter of

Amendment of Section 73.202(b), RM-7936
Table of Allotments,
FM Broadcast Stations.
(Edmond, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1992; Released: March 20, 1992

Comment Date: May 11, 1992
Reply Comment Date: May 26, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Porter H. Davis, d/b/a Life Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 250A for Channel 249A at Edmond, Oklahoma, and the modification of Station KTNT-FM's license to specify the alternate Class A channel in order to permit operation with 6 kW of power. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 250A for Channel 249A at Edmond since it could enable Station KTNT-FM to operate with maximum Class A facilities. As requested, we also propose to modify Station KTNT-FM's license to specify operation on the alternate Class A channel. Channel 250A can be allotted to Edmond in compliance with the Commission's minimum distance separation requirements at Station KTNT-FM's presently licensed site.[4]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Edmond, Oklahoma	249A	250A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 11, 1992,** and reply comments on or before **May 26, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Porter H. Davis, President
Life Broadcasting, Inc.
9400 North Broadway Street, Suite 515
Oklahoma City, Oklahoma 73114
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 250A at Edmond are North Latitude 35-34-11 and West Longitude 97-30-01.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US COMMUNICATIONS OF ILLINOIS, INC. File No. I-T-C-92-048

Application for authority to operate as an international resale carrier.

NATIONAL TELECOMMUNICATIONS CONSULTANTS, INC. File No. I-T-C-92-049

Application for authority to operate as an international resale carrier.

ARBUD TELESYSTEMS, INC. File No. I-T-C-92-052

Application for authority to operate as an international resale carrier.

TELEPACIFIC COMMUNICATIONS CORP. File No. I-T-C-92-056

Application for authority to operate as an international resale carrier.

PUBLIC SWITCH CORPORATION File No. I-T-C-92-057

Application for authority to operate as an international resale carrier.

CC/USA INTERNATIONAL LTD. File No. I-T-C-92-060

Application for authority to operate as an international resale carrier.

TEL-SAVE, INC. File No. I-T-C-92-061

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 12, 1992; Released: March 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by US Communications of Illinois, Inc. (USCI), National Telecommunications Consultants, Inc. (NTC), Arbud Telecommunications, Inc. (Arbud), Telepacific Communications Corp. (Telepacific), Public Switch Corp., CC/USA International Ltd. (CC/USA) and Tel-Save, Inc.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-048, I-T-C-92-049, I-T-C-92-052, I-T-C-92-056, I-T-C-92-057, I-T-C-92-060 and I-T-C-92-061 ARE GRANTED, and

a. USCI and NTC are authorized to provide international switched voice, facsimile and data service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, US Sprint's Tariffs F.C.C. Nos. 1 and 2, Intellicall Operator Services, Inc.'s Tariff F.C.C. No. 1, International Telecharge's Tariff F.C.C. No. 1, and WTG's Tariff F.C.C. No. 1 between the US and the points listed in those tariffs;

b. Arbud is authorized to provide international switched voice service by the resale of the international switched voice service set forth in Intellicall Operator Services, Inc.'s Tariff F.C.C. No. 1 between the US and the points listed in that tariff;

c. Telepacific is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, West Coast's Tariff F.C.C. No. 1 and ANT's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs;

d. Public Switch is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tarifs F.C.C. Nos. 1 and 2 between the US and the points listed in those tariffs;

e. CC/USA is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs: and

f. Tel-Save is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PRIME LONG DISTANCE SERVICES, INC. d/b/a LONG DISTANCE FOR LESS — File No. I-T-C-92-040

Application for authority to operate as an international resale carrier.

WORLDPHONE COMMUNICATION, INC. — File No. I-T-C-92-042

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 12, 1992; Released: March 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Long Distance for Less (LDL) and Worldphone Communication, Inc. (Worldphone).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-040 and I-T-C-92-042 ARE GRANTED; and

a. LDL is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and TRT's Tariff F.C.C. No. 15 between the U.S. and the international points listed in those tariffs; and

b. Worldphone is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, US Sprint's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and Metromedia Communications Corp.'s Tariff F.C.C. Nos. 1 and 2 and between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUBLIC COMMUNICATION SERVICES, INC. File No. I-T-C-92-043

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 12, 1992; Released: March 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Public Communication Services, Inc. (PCSI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-043 IS GRANTED, and PCSI is authorized to provide international switched voice service by the resale of the international switched voice service set forth in Intellicall Operator Service, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the international points listed in that tariff.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INCORPORATED — File No. I-T-C-92-025

Application for authority to lease and operate satellite facilities for service between Hawaii and certain Pacific points.

ORDER AND AUTHORIZATION

Adopted: March 13, 1992; Released: March 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, requesting authority to lease and operate satellite facilities for service between Hawaii and Pacific ocean Region points, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-025 IS GRANTED, and GTE Hawaiian Telephone Company, Incorporated (HTC) is authorized to:

a. acquire the radio-frequency (RF) portion of ground segment capacity from GTE Spacenet and space segment capacity from Comsat and operate the number of satellite circuits to each point specified in the attached Appendix between the Sunset earth station in Hawaii and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and the points specified, furnished by HTC's overseas correspondents;

b. lease and operate a greater or lesser number of circuits to each point listed in the Appendix, but not to exceed a total of 23 circuits for the period of 1992 - 1994; and

c. use said facilities to provide HTC's regularly authorized services between Hawaii and the points specified in the attached Appendix and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. The Commission's Order and Authorization, DA 89-182, released February 21, 1989, File No. I-T-C-89-032,[1] is hereby modified to reflect the authority granted herein.

5. HTC shall file a new application for facilities and service to points in the Pacific area on or before October 1, 1994.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	No. of Satellite Circuits		
	1992	1993	1994
People's Republic of China	10	10	10
Fiji	2	2	2
Papua, New Guinea	5	5	5
Tonga	6	6	6
Total	23	23	23

FOOTNOTE

[1] GTE Hawaiian Telephone Company, Inc., 4 FCC 1644 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-038

Application for authority to acquire and operate facilities for service between the U.S. and Cameroon.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 13, 1992; Released: March 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the Cameroon by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-038 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 12 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Cameroon furnished by MCI's correspondent in Cameroon;

b. own and operate 12 voice-grade circuits in the Andover earth station to be used in conjunction with the satellite space segment;

c. own and operate 12 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Cameroon and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Cameroon and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN EQUIPMENT CORPORATION OF CLEARWATER, INC. File No. I-T-C-92-068

Application for authority to operate as an international resale carrier.

HORRY TELEPHONE LONG DISTANCE, INC. File No. I-T-C-92-069

Application for authority to operate as an international resale carrier.

U.S. LINK LONG DISTANCE File No.I-T-C-92-070

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 13, 1992; Released: March 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Southern Equipment Corporation of Clearwater, Inc. (SECC), Horry Telephone Long Distance, Inc. (Horry) and U.S. Link Long Distance (US Link).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-068, I-T-C-92-069 and I-T-C-92-070 ARE GRANTED; and

a. SECC is authorized to provide international switched voice service by the resale of the international switched voice service set forth in US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs;

b. Horry is authorized to provide international switched voice and data service by the resale of the international switched voice service set forth in MCI's Tariff F.C.C. No. 1, between the U.S. and the international points listed in that tariff; and

c. US Link is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 20, 1992

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. PETITION FOR WAIVER OF SECTIONS 36.611(a) AND 36.613(a) OF THE COMMISSION'S RULES

Public Comment Invited

On January 31, 1992, The National Exchange Carrier Association filed a petition for waiver of sections 36.611(a) and 36.613(a) of the Commission's rules for 1992 and 1993. Section 36.611(a) governs the submission of data by exchange carriers to NECA for developing the Universal Service Fund (USF) expense adjustment and section 36.613(a) governs NECA's filing of USF data with the Commission. NECA requests that the date required for exchange carriers to submit data to NECA be moved from June 30 to August 31, and the date required for NECA to submit these data to the Commission be moved from September 1 to November 1. NECA requests that this change be made for 1992 and 1993, stating that it believes such a change will allow for improved accuracy of the data.

Interested parties should file comments regarding the National Exchange Carrier Association's petition for waiver of sections 36.611(a) and 36.613(a) no later than **April 8, 1992.** Reply comments should be filed no later than **April 20, 1992.** Comments should reference AAD 92-19. A copy of each pleading should be sent to Gary Seigel, FCC, Common Carrier Bureau, 2000 L Street, NW, Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W. Washington, D.C. 20036, (202) 452-1422. Copies are available for inspection and copying in Room 812, 2000 L Street, NW, Washington, D.C. Copies are also available from DCC.

For further information contact Gary Seigel, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 20, 1992

ACCESS CONFERENCE CALL SERVICES' REQUEST FOR WAIVER

Access Conference Call Services (Access) has requested, under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, a waiver of the preamble requirement contained in Section 64.711 of the Commission's rules, 47 C.F.R. § 64.711. *See* Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket 91-65, Report and Order, 6 FCC Rcd. 6166 (1991). That rule requires that all usage sensitive pay-per-call programs have a preamble which discloses the price, gives the name of the information provider, provides a brief description of the service and affords the caller an opportunity to hang up before charges are imposed. Access maintains that it should not be required to provide a preamble on its business conference services, which are provided on a usage sensitive basis at a cost of $.59 per minute.

Parties wishing to comment on this matter may do so no later than **April 13, 1992.** Replies may be filed no later than **April 28, 1992.** All filings concerning this matter should refer to File No. ENF-92-05.

Copies of the petition for waiver and any subsequently filed documents in this matter may be obtained from Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. The petition and documents are also available for inspection and copying at the Plaza Level, 1250 23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Thomas David at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-273

In the Matter of

Amendment of Part 63 of
the Commission's
Rules to Provide for
Notification by Common
Carriers of Service Disruptions

REPORT AND ORDER

Adopted: February 13, 1992; Released: February 27, 1992

By the Commission: Commissioners Sikes, Chairman; Barrett and Duggan issuing separate statements

I. INTRODUCTION

1. By this action, the Commission is adding Section 63.100 to its rules to require that local exchange and interexchange common carriers that operate either transmission or switching facilities promptly notify the Commission of service outages whenever telephone services provided by their networks are significantly disrupted.

II. BACKGROUND

2. On September 19, 1991, the Commission released a Notice of Proposed Rulemaking in this proceeding, FCC 91-285, 6 FCC Rcd 5531 (1991), (NPRM), proposing that any facilities-based common carrier that provides access service or that provides interstate or international telephone service, which experiences a loss of telephone service to 50,000 or more of its customers or voice grade equivalent circuits, for 30 or more minutes, file an Initial Service Disruption Report with the Commission within 90 minutes of the commencement of the service outage. The NPRM proposed that notification be served on the Commission's Monitoring Watch Officer by record means, providing, as available: (1) the date and time of the incident; (2) the geographic area affected; (3) the number of customers or voice grade equivalent circuits affected; (4) the types of services affected (*e.g.*, interexchange, local, cellular, 911 emergency services); (5) the duration of the incident; (6) the estimated number of lost erlangs;[1] (7) the cause of the incident; (8) methods used to restore service; and (9) the steps taken to prevent recurrence of the outage. Thirty days after the incident, the carrier would be required to file with the Chief, Common Carrier Bureau a Final Service Disruption Report, updating its initial assessment. Comments were requested on this proposal and any alternative proposals that would serve to inform the Commission of the extent and severity of significant outages. Twenty five comments were filed on November 26, 1991 and twenty one reply comments were filed on or before December 30, 1991.[2]

III. DISCUSSION

3. The comments overwhelmingly support the Commission's proposal to require prompt notification of significant telephone service outages.[3] However, many parties request clarifications and modifications. These requests are resolved below.

A. Purpose

4. Several commenters ask the Commission to state specifically its purpose in requiring notification. As noted in the NPRM, we currently have no systematic way by which to become informed quickly of significant service outages, and we are also unable to determine whether particular kinds of technology or equipment or other changes may threaten service reliability. The Commission currently uses a variety of measures to track telephone company service performance. These include such things as customer satisfaction levels, dial tone response, transmission quality, and call failure due to network capacity or equipment problems. As a general matter, these indices show improvement in telephone service over the last five years.[4] In addition, a recent study of the nation's telecommunications infrastructure found "the service quality performance of common carriers has been very good and getting better since divestiture."[5]

5. Notwithstanding these general trends, the nation has experienced several widespread telephone service outages during the last two years.[6] The reports we currently receive do not give us information on outages on a real-time basis. We believe it important to have a systematic means by which to monitor major telephone service outages throughout the nation on a timely basis. Our purposes in requiring notification, therefore, are: to become aware of significant outages at the earliest possible time so that we may monitor developments; to serve as a source of information for the public; to encourage and,

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[1] *See* paras. 19-21, *infra*.

[2] On December 10, 1991, GE American Communications, Inc. (GE Americom), a provider of satellite communications capacity to private and government users, submitted a late-filed comment. For good cause shown, we accept this comment. Commenters are listed in Appendix A.

[3] GTE Service Corporation (GTE) maintains that the reporting requirement is unnecessary, and Williams Telecommunications Group, Inc. (WilTel), operator of a national fiber optic network, argues that the requirement should apply only to dominant carriers. In light of our purpose in imposing a reporting requirement as stated in paras. 4 and 5, *infra*, these arguments are rejected.

[4] *See, e.g.*, FCC update on Quality of Service for the Bell Operating Companies (July 1991).

[5] Telecommunications in the Information Age, NTIA Special Publication 91-26 (October 1991).

[6] For example, the telephone service outage of AT&T at a facility near Blackstone, Massachusetts on November 5, 1991 marked the fourth major AT&T outage during 1990 and 1991. In the summer of 1991, Pacific Bell and Bell Atlantic experienced several significant service outages associated with failures in their signalling networks.

where appropriate, to assist in dissemination of information to those affected; to take immediate steps, as needed, and after analyzing the information submitted, to determine what, if any, other action is required.

B. Definitions

6. Many commenters ask us to define key terms used in the NPRM. Based on suggestions provided by commenters,[7] we will define these terms here and insert clarifying language in the rules:

a. "Outage" is defined as a significant degradation in the ability of a customer to establish and maintain a channel of communications as a result of failure in a carrier's network.

b. "Customer" is defined as a user purchasing telecommunications service from a common carrier.

C. Issues

7. **Notification threshold** - Numerous alternatives to the Commission's proposal were submitted. AT&T states that the proposed 50,000 customer/30 minute threshold would be unworkable for interexchange carriers (IXCs) because the true measure of customer impact for an IXC is the number of call attempts actually blocked and not the number of customers that may potentially have lost service. AT&T proposes a reporting threshold of blocked calls greater than 1% of the total call attempts in the carrier's network for an average business day. Similarly, Pacific Bell and Nevada Bell (Pacific) argue that in order to assure that smaller carriers are included in the reporting requirements, notification should be required whenever a certain percentage of the carrier's customers are affected for 30 minutes or more, regardless of the actual number of customers involved. These comments are opposed by US Sprint Communications Company (Sprint) which in reply comments argues that a percentage threshold of 1% would benefit only AT&T, which could avoid reporting significant outages affecting large numbers of customers. Sprint states that it supports the 50,000 customer threshold. NYNEX asks the Commission to clarify whether "50,000 customers" means potential customers or actual customers affected. Southern New England Telephone Company (SNET) points out that if a fiber cable carrying 50,000 voice grade equivalent circuits is cut and the traffic is immediately switched to an alternate route, few customers will be affected. Therefore, SNET states, carriers should have to report only those outages which affect 50,000 or more customers, not circuits. Moreover, SNET argues, if a carrier determines after filing its initial report that 50,000 customers were, in fact, not affected, it should not be required to file a Final Service Disruption Report. Finally, SNET proposes that the 30 minute "clock" should start running only after the carrier determines that 50,000 customers are affected.

8. Conversely, Tele-Communications Association (TCA), an association of telecommunications managers representing over 1,000 users of telecommunications services, argues that the Commission's proposed threshold is too high and would omit hundreds of switch-based outages that cumulatively affect millions of people. TCA proposes that outages should be reportable if they affect 5,000 or more lines or voice grade equivalent circuits for more than 20 minutes or 1,000 or more lines or voice grade equivalent circuits for more than 10 minutes.[8] California Bankers Clearing House Association *et al.* (CBCHA) requests that the 50,000 circuit threshold be reduced to 30,000 because even at the lower level, the impact may be severe. NYNEX recommends that the loss of telecommunications services to national security facilities and major airports be reportable even if less than 50,000 customers or circuits are affected. Similarly, New York City Department of Telecommunications and Energy (New York), and TCA in its reply comments, request that all outages affecting facilities supporting 911 services be reported regardless of the number of lines affected.

9. Allnet Communications Services, Inc. (Allnet) argues that the standards for local exchange carrier (LEC) notification for outages should be stricter than those for IXCs because IXCs currently have no way of knowing if a LEC upon whom they depend for access is experiencing an outage. Therefore, Allnet proposes that LECs be required to notify IXCs (as well as the Commission) of any outage affecting 5,000 or more customers lasting at least one hour, or any outage affecting at least 50,000 or more customers lasting at least 15 minutes. Similarly, MCI Telecommunications Corporation (MCI) proposes that the 50,000 customer standard apply only to LECs because they deal with end users, and the 50,000 voice grade equivalent circuits standard should apply to IXCs. The end users are disembodied from the IXC, MCI argues, because the IXCs only purchase access from the LECs and receive or present the message at an arranged point of contact with the LEC; therefore, the IXCs are not in a position to know how many customers are affected.

10. Several other commenters argue that outages of shorter duration should be reported because they, too, can affect the public adversely. The Public Service Commission of the District of Columbia (D.C.), suggests 10 minutes; Metropolitan Fiber Systems, Inc. (MFS), a competitive access provider, and New York suggest 15 minutes as the minimum time for reportable outages.[9] On the other hand, Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), MCI, NYNEX, and GTE in its reply comments, cite the conclusions reached during the Telecom '91 meeting of the International Telecommunication Union (ITU) in Geneva on October 11, 1991 at which FCC representatives met with communications officials, network operators, and equipment suppliers from Europe, Japan, Canada, Australia and elsewhere to discuss sharing information on ser-

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[7] *See, e.g.*, comment of NYNEX Telephone Companies (NYNEX) at p. 4.

[8] TCA proposes that the former should be reported within 90 minutes and the latter should be reported within twenty four hours. *See* para. 23, *infra*.

[9] MFS proposes that the reporting threshold should be 15,000 customers or voice grade equivalent circuits. Additionally, MFS argues that if competitive access providers are interconnected with the LEC's networks, these fiber optic transmission networks will provide a level of redundancy which will permit service during a LEC outage. The matter of expanded interconnection is currently being considered in Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 6 FCC Rcd 3259; 6 FCC Rcd 5809 (1991), and is beyond the scope of this proceeding.

vice outages. The commenters state the consensus at that meeting was that only outages lasting 60 minutes or more should be reported among these countries. Consistent with this conclusion, the carriers argue, only outages of 60 minutes or more should be reportable to the Commission.

11. Initially, we accept SNET's argument and modify the proposed rule to require reporting only of those outages that affect 50,000 or more customers and not those based solely on an effect upon voice grade equivalent circuits. Our concern, as we have already stated, focuses on loss of service to the public. If an incident affects 50,000 or more voice grade equivalent circuits but does not, through the use of redundant facilities and rerouting capabilities, for example, result in a service outage, the event does not have the same public significance as a loss of telephone service.[10] Furthermore, as requested by NYNEX, we clarify that "50,000 customers" means potential users. For example, if a carrier experiences an outage affecting a large customer, or several large customers, such that it should reasonably expect that at least 50,000 potential users will be deprived of telephone service, the carrier should report the outage. It is not necessary for the carrier to verify that 50,000 or more potential users have, in fact, lost telephone service before reporting the outage. Instead, the carrier should estimate, based on the severity of the incident, whether 50,000 or more potential users were affected. If the answer is affirmative, and the outage continued for 30 or more minutes, then the incident must be reported. We will modify the proposed rule accordingly. Moreover, while we accept MCI's argument that IXCs may not know within 90 minutes the number of end users affected by an outage in their network, we do expect IXCs to estimate the number of customers potentially affected by such outage and to report those outages that exceed the prescribed threshold. Finally, we clarify that an outage is a significant degradation in the ability the customer normally would have to establish and maintain a channel of communications. The fact that some traffic might be getting through during a period of massive disruption would not mean an outage has not occurred.

12. Next, we reject AT&T's proposal that the reporting threshold be measured in terms of blocked calls greater than 1% of total call attempts in the carrier's network for an average business day. As we stated in the NPRM, our goal in requiring notification is to facilitate our becoming quickly aware of "significant service disruptions." Under AT&T's proposal, significant outages affecting hundreds of thousands of customers might go unreported simply because the percentage threshold concerning blocked calls has not been met. We will require that carriers estimate the number of blocked calls as a measure of the severity of the outage. *See* para. 21, *infra*. However, in light of difficulties some carriers may encounter in estimating blocked calls within our 90 minute notification deadline, we believe that the reporting threshold should rely on number of customers potentially affected instead of on blocked calls.

13. We are concerned, however, that the 50,000 customer threshold proposed in the NPRM may not be adequate to include all major service disruptions. As TCA points out in its comments, numerous switch outages occurred in the second quarter of 1991, for example, that cumulatively affected millions of lines but that, individually, may not have been reportable if they did not meet the 50,000 customer threshold. Thus, TCA and other commenters argue for a lower threshold.[11] The comments have, however, presented us with insufficient evidence to enable us to formulate a lower threshold that would better serve to notify us immediately of significant outages while not unreasonably increasing the administrative burden on the carriers and the Commission.

14. In addition, several commenters raise the need for the Commission to be informed of outages that involve national security, major airports, and 911 service customers, even when such outages do not meet the proposed 50,000 customer threshold. National security outages are within the purview of the National Communications System (NCS) and are already reported to that organization (*see* paras. 33-34, *infra*). We will continue to work closely with the NCS to be informed quickly of outages affecting national security. With reference to outages affecting major airports or 911 services, however, we are concerned that outages concerning these vital services may go unreported if they do not meet the reporting threshold, with concomitant hazard to the public. In this case too, the comments have not presented us with sufficient information to formulate a discrete or lower threshold that would inform us of significant threats to public safety while not unreasonably increasing the reporting burden.

15. In these circumstances, we believe that the best course of action is to adopt the proposed 50,000 customer threshold as an interim step in achieving our goal of becoming informed quickly of significant service outages, but, at the same time, to refer to the Commission's newly-created Network Reliability Council the questions of whether the reporting threshold for service outages should be lower than 50,000 customers, and whether a separate threshold for reporting outages affecting 911 services or major airports should be adopted.[12] We ask the Council to issue its final report on this matter within 60 days from the release date of this Report and Order. The Commission will then take prompt appropriate action.

16. Finally, we will not adopt different reporting standards for LECs and IXCs in response to any alleged lack of communication between these carriers, as suggested by Allnet. We do not expect our reporting procedures to serve as a substitute for proper operations, maintenance and communication procedures that should exist between carriers. Improving notification and information exchange among carriers is being addressed with Commission en-

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[10] *See also* para. 18, *infra*.

[11] TCA's information came from ARMIS 43-05 reports filed with the Commission (*see* n.15, *infra.*), which supply information on switch downtime events. Although switch downtime is one of many metrics the Commission monitors to track industry and company performance, it is not the only cause of network disruptions.

[12] The Network Reliability Council has been formed to provide the Commission and the industry with recommendations as to how public telephone network outages can be avoided and, if they occur, how their impact can be minimized. *See* FCC News release, released December 13, 1991.

couragement in the Network Operations Forum (NOF),[13] and, at this time, we believe can effectively be solved there. If private efforts are unsuccessful in ensuring effective communications among carriers, we will revisit the issue.

17. Further, we will not raise the threshold for reporting an outage to 60 minutes. While 60 minutes may be a useful bench mark for initial international reporting purposes, we do not believe that the same considerations apply to our domestic concerns. On an international level it is most useful for countries to share information of an historical nature concerning outages that involve major failures of commonly-used technology. Such outages will generally last more than an hour, and a 60 minute minimum reporting standard appeared appropriate at the initiation of this international agreement. However, the Commission is concerned about any outage that may have significant impact on the public, whether it is caused by equipment failure, or any other reason, and information is needed on a real-time basis. Moreover, we may at times wish to monitor even more carefully a specific geographic region, specific industry practices or a particular carrier to discern a possible pattern. Therefore, we need to be informed of any outage, regardless of its cause, that may have significant impact on telephone users.[14] While any time frame has advantages and disadvantages, in the NPRM we tentatively concluded that outages of 30 minutes provide a suitable threshold to meet our concerns. The comments have not persuaded us otherwise. Accordingly, we will retain the 30 minute threshold.[15] Additionally, we conclude that outages of less than 30 minutes need not be reported immediately. We are not convinced based on the evidence before us that outages of shorter duration than proposed have had such a significant impact on the general public using telephone service as to require immediate Commission involvement. Previously established FCC reporting requirements will allow us to assess trends over time. While the gathering of real-time information on any outage may ultimately prove useful, we must balance that prospect against the increased administrative burden on the carriers and the Commission. Applying this test, we believe that 30 minutes should be the minimum reportable duration here. As we develop experience with this standard, of course, the Commission can assess whether any modifications may be indicated.

18. In the NPRM we asked for comments on whether network incidents that do not result in outages but have significant reliability consequences should be reportable. AT&T, Central Telephone Company (Centel), GTE, MCI, and Southwestern Bell Telephone Company (Southwestern) argue against such an extension. Although, as noted above, there is an advantage in gathering as much information as possible concerning outages, we agree with Centel that there would be great difficulty in defining a threshold for reporting incidents that do not result in outages. Further, we note Centel's comment that such information is not now collected by the carriers and would create an additional administrative burden. We also note MCI's comment that such reporting requirements would be difficult to define. For all these reasons, we will not require the reporting of incidents that do not result in outages, but encourage industry to share additional information, including through the NOF, that could be useful in avoiding or minimizing the impact of future outages.

19. **Outage measurement** - In the NPRM we proposed that the carriers notify us of erlangs lost during an outage, and we defined an erlang as one telephone call lasting one hour. The carriers overwhelmingly reject lost erlangs as the appropriate standard for measuring lost telephone service. Ameritech Operating Companies (Ameritech) points out that if a switch is out of service the carrier will be unable to measure traffic completed or blocked at that point. Bell Atlantic states that there is a "lack of precision" on the part of carriers in measuring calling volumes during off-peak hours and that, therefore, a lost erlangs estimate for such period would be of questionable value. Similarly, SNET states that the measurement of lost erlangs is in an "early stage of development," and should not be used until there is an industry consensus as to an appropriate formula. BellSouth, Centel, Southwestern, and U S West Communications, Inc. (U S West) reject the lost erlangs standard because, as BellSouth puts it, the same amount of lost erlangs in the middle of the night in the suburbs has a different impact than in the financial district at peak business hours. Similarly, GTE states that lost erlangs are based on historical traffic studies reflecting specific time periods not necessarily corresponding to the failure time period. NYNEX states that erlangs distort actual measurement and create a "worst case scenario" assuming that all affected customers would have made a call at the start of an outage and stayed on during the duration of the outage.

20. Other commenters propose alternative measurement standards. Centel proposes that the Commission consider requiring the reporting of switched traffic levels one hour before the service outage and one hour after service has been restored as a way of measuring amount of traffic loss. AT&T and MCI argue that the number of blocked calls should be reported instead of lost erlangs as a more accurate measure of outage impact (although MCI points out in its reply comments that not all carriers have the

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[13] The NOF is an organization composed primarily of personnel from the various exchange and interexchange carriers, meeting periodically to discuss operational problems of mutual interest. The NOF currently is acting upon many options to improve network reliability, including establishing an independent communications network through which carriers can share in real time information on failures in their networks. *See, e.g.*, Network Operations Forum, Issue No. 128, "Emergency Communications."

[14] For this reason we reject the proposals of BellSouth and GTE that only those outages related to network reliability be reported, as opposed to outages caused by natural disasters or scheduled software upgrades. All outages that cross the prescribed threshold must be reported.

[15] MCI in its reply comments points out that all but the smallest LECs have now elected to be regulated on the basis of price cap regulation and as such file quarterly and semiannual ARMIS 43-05 reports, reporting disruptions that last as little as two minutes. MCI argues, therefore, that only those outages lasting at least 60 minutes should be reportable. We disagree. The ARMIS reports are extremely useful in monitoring industry trends, but they do not, and are not intended to, provide immediate information. As pointed out in paras. 4 and 5, *supra*, prompt awareness of significant outages is one of our primary purposes in adopting the notification requirement.

technology to measure blocked call attempts on a real-time basis). John C. McDonald, President of MBX, Inc. (McDonald) proposes that outages be measured in ULES, which he defines as:

$$ULE = \log_{10}(E \times H)$$

where E = estimated average user traffic lost during the time of outage in erlangs; and H = outage in hours. McDonald proposes that any outage which measures 4 ULES or more should be reported. McDonald rejects blocked calls as an accurate outage measurement because the number will be inflated by the large number of automatic redials. Conversely, NYNEX argues in its reply that using blocked calls as an outage measurement will result in an underestimation by IXCs of the magnitude of the outage because IXCs will be unable to measure the calls that a LEC is trying to deliver to the failed facility.

21. In light of the overwhelming opposition and the persuasive arguments expressed by the commenters against the use of lost erlangs as an accurate measurement of service outages, we will not use that standard at this time. We are particularly aware as indicated in SNET's comments, among other parties, that there is currently no industry consensus on an accurate formula to measure lost erlangs. We intend to monitor closely the various industry efforts, particularly those of the NOF, to develop an accurate, useful, formula for outage measurement.[16] In the interim, we will adopt AT&T's and MCI's proposal and use estimated number of blocked calls for outage measurement.[17] Section 63.100 will be modified accordingly.[18]

22. **Notification deadline** - BellSouth, Centel, GTE, Pacific, SNET, U S West, and United Telephone System Companies all state that 90 minutes is insufficient to gather and report the information requested by the Commission, and that, therefore, they may be faced with the choice of either missing the deadline or not submitting all the requested information. Therefore, these commenters request a longer reporting time for the initial report, such as four hours. Moreover, NYNEX, among others, suggests that certain information requested by the Commission, such as "steps taken to prevent recurrence," be left to the Final Service Disruption Report because more accurate information would be available at that time. Iowa Network Services, Inc. (Iowa), a centralized equal access provider owned by 125 independent LECs, argues that to minimize the impact on smaller carriers, the 90 minute deadline should be applied only to outages affecting over 75,000 customers because smaller companies need to devote all their resources to fixing the outage, not filing reports. Carriers experiencing outages affecting 50,000 to 75,000 customers, Iowa argues, should have 24 hours to report an outage (and then only if the outage lasts six hours).

23. We will retain the 90 minute reporting deadline. We view the filing of the initial report as the commencement of an information-gathering process. The Commission's staff will follow up the initial report with oral or written inquiries, as needed, requesting clarification or additional information pending submission of the Final Service Disruption Report.[19] As stated above, our purpose in requiring prompt notification is to serve as a source of information to the public and to allow the FCC as well as other carriers to take any immediate action that may be required. For this reason, it is critical that carriers supply information at the earliest time that useful information is available.[20] We emphasize that we expect a good-faith attempt on the part of the carrier to supply the most accurate information available. However, absent evidence of negligence or attempt to mislead on the part of the reporting party, we will not penalize a carrier who submits an initial report that is incomplete, or that ultimately proves incorrect in some respects, if the carrier has applied its best efforts to comply with our reporting requirements. Therefore, we will adopt NYNEX's proposal and add to Section 63.100 of the rules, "Lack of any of the above information shall not delay the filing of this Report." While carriers should supply as much information as they are able in the initial report, the purpose of the final report is to allow carriers up to 30 days to conduct a full investigation. Moreover, consistent with NYNEX's, Southwestern's and Rochester Telephone Corporation's proposals, we will modify Section 63.100 to state that, "The notification must be by facsimile or other record means delivered within 90 minutes of the carrier's knowledge that the service outage potentially affects 50,000 or more customers, if the outage continues for 30 or more minutes."[21]

24. **Application to all carriers** - AT&T states that restricting the reporting requirement to facilities-based carriers is unwise because an outage by a carrier that is not facilities-based but utilizes its own switching equipment can have a significant impact. Instead, AT&T argues, the reporting requirements should apply to all IXCs having

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[16] *See, e.g.*, NOF Issue No. 145, "SS7 Network Outage Information Exchange."

[17] In doing so we are aware of the shortcomings of this approach as pointed out by McDonald and NYNEX; however, we expect that during the follow-up investigation of an outage conducted by the involved carrier, as well as any investigation by the Commission's staff, accurate measurements of the scope and impact of that carrier's particular outage will emerge. *See* para. 23, *infra*.

[18] We share MCI's concern that not all carriers will be able to report accurately within 90 minutes the precise number of blocked calls resulting from the outage. Therefore, the rule requires the carrier's initial best estimate of the number of blocked calls, and supplemental information in its Final Service Disruption Report.

[19] Therefore, we reject CBCHA's request that the initial report automatically be updated every four hours. Moreover, the staff may, on its motion or pursuant to the carrier's request, waive the filing of a Final Service Disruption Report if in the course of its investigation it determines that the outage did not, in fact, reach the reportable threshold.

[20] We reject as too vague United States Telephone Association's (USTA's) proposal that the requested information be submitted "as soon as possible" instead of in 90 minutes.

[21] We clarify that the 30 minute "clock" starts running from the estimated time of commencement of the outage even though this will not always conform to the time the carrier found out about the outage. Similarly, the "time of the incident" required to be reported by Section 63.100 means "estimated time of commencement of the outage." We also clarify in Section 63.100 that "duration of the incident" means the time elapsed from the estimated commencement of the outage until restoration of full service. Moreover, carriers should telephone the Commission's Watch Officer after transmitting their facsimile or other record means of notification to verify that it has been received by the Commission.

annual revenues from telecommunications operations of $100 million or more, as well as to facilities-based carriers. Bell Atlantic, Pacific, and Centel ask that the rule be applied to competitive access providers, as well. GTE inquires whether:, the proposed rule would apply to cellular carriers, and in its reply comments suggests that equipment vendors and software manufacturers be included in the reporting requirement.[22] MCI proposes that the Commission clarify which carrier must report an outage when the outage affects both the LEC and the connecting IXC. There is nothing in the proposed rules, MCI points out, that specifies that the carrier that owns or operates the affected facilities must report the outage. GE Americom points out that satellite communications carriers do not know if their customers are using the capacity they lease for telephone or television transmission. GE Americom asks, therefore, that the Commission exclude from the reporting requirement all carriers that supply transmission capacity alone and generally do not know how this capacity is used.

25. First, we will accept MCI's proposal and clarify the rule to state that when an outage affects both a LEC and the connecting IXC, the carrier which owns or operates the affected facilities must report the outage, although we encourage all affected carriers to notify the Commission when they become aware of a reportable outage. In addition, we will require reports from all interexchange carriers that operate either transmission or switching facilities which experience an outage within the parameters of the rule. Resale common carriers who operate their own switches, when selected by customers as their primary interexchange service provider are, from the customer's viewpoint, indistinguishable from IXCs who own and operate all of their facilities. Outages on switching equipment owned or operated by non-facilities-based resale common carriers can have a significant impact on the public, and may otherwise go unreported. Therefore, we will include resale common carriers in our reporting requirements. However, we find no justification to extend the reporting requirement to satellite or cellular carriers or competitive access providers. Although disruptions to these services may be significant, alternative methods of communication are generally available to these users. We believe that the emergency reporting requirements we are adopting today are best limited to those services where outages have raised the greatest concerns: basic local exchange and interexchange telephone service. Finally, while we deem it unreasonable to require vendors and manufacturers to comply with the filing requirements concerning equipment whose use is not under their control, we do expect the carriers to consult fully with vendors and manufacturers, where appropriate, before filing their Final Service Disruption Reports.

26. **Additional reporting requirements** - GTE recommends that the name and type of equipment involved in the outage should also be reported. Pacific states that instead of reporting the services affected, which will almost always be the same (i.e., all), the carriers should report the specific part of the network affected such as loop, local switch, interoffice cable, SS7, etc. CBCHA states that the Commission should require carriers to report pre-deployment test data that reveals problems that could foreseeably cause outages, and in its reply comment adds that post-deployment incidents from which a carrier recovers within the threshold period but about which it could provide valuable information should also be reported. New York requests that the carriers be required to file semiannual reports for all outages having significant reliability consequences.[23]

27. We are persuaded that the carriers should submit in their Initial and Final Service Disruption Reports the information proposed by GTE and Pacific; and we will modify the rule accordingly. As we stated above at para. 4, one of our primary purposes in requiring notification is to determine whether particular kinds of technology or equipment or other changes may threaten service reliability. Receipt of the information proposed by GTE and Pacific will facilitate our investigation. Additionally, as stated above, the filing of the Initial Service Disruption Report is the first step in an information-gathering process. If the type of information mentioned by CBCHA is relevant to the cause of the outage, its identification, restoral, customer impact, etc., we expect it to be reported, to whatever extent possible in the Initial Service Disruption Report. Moreover, the Final Service Disruption Report, to be filed within 30 days of the incident, must include "all available information on the service outage, including any information not contained in [the] Initial Service Disruption Report."[24] Furthermore, we encourage all carriers to inform the Commission of all relevant data with respect to service outages and network reliability and to exchange information within the industry, *e.g.*, through the NOF, concerning how they have avoided or dealt with service problems and vulnerabilities.

28. The Manager of the National Communications System (MNCS) points out that there is no current systematic process to monitor the effectiveness of the Commission's Telecommunications Service Priority (TSP) system.[25] Therefore, MNCS suggests that the carriers, as part of the Initial Service Disruption Report, be required to identify service failures that were assigned a TSP priority, as well as the time of restoration of these identified circuits. The Utilities Telecommunications Council (UTC), a national association on communications matters for the nation's electric, gas, water, and steam utilities, concurs with this request. MNCS' request is opposed by

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[22] In reply comments, the Cellular Telecommunications Industry Association (CTIA) opposes the inclusion of cellular carriers in the reporting requirement. CTIA states that Part 63 of the rules deals with fixed interstate common carrier facilities while cellular involves mobile communications and primarily serves a local market. Moreover, CTIA argues, the 50,000 threshold is inappropriate for cellular carriers because the number of their customers keeps changing due to roaming users from neighboring systems, and that, therefore, they do not know how many customers are affected by an outage.

[23] The information proposed by New York is already submitted by all major carriers. *See* n. 15, *supra*.

[24] We believe it would be premature to adopt, at this time, MCI's and NYNEX's suggestion that the Commission prescribe a form for the reporting of outages. If with the passage of time it becomes clear that a reporting form would improve the reporting process, we will proceed accordingly.

[25] TSP is the system used to authorize common carriers to provide certain new services on a priority basis and to restore predesignated services on a priority basis in the event of failure. 47 C.F.R. § 64.401. *See* para. 33, *infra*.

GTE and U S West. GTE points out that its TSP restoral priority procedures are fully automated from the time the trouble report is received until the repair work is performed, a process which took a year to implement. Revisions now would be time consuming and costly, GTE maintains. U S West, NYNEX, and GTE suggest that the matter should be referred to the TSP System Oversight Committee, an intergovernmental/industry organization, [26] before any changes are implemented.

29. We are sensitive to the concerns noted by MNCS but decline to add TSP-related information to the reporting requirements at this time. We are concerned that this additional reporting requirement could add significant costs to the TSP system, and may be infeasible. We believe that the better course at this time is to refer the matter to the TSP Oversight Committee, which is the appropriate forum to consider changes or enhancements to the TSP system.

30. **Dissemination of the reports** - AT&T, BellSouth, Southwestern, WilTel, and GTE in its reply comments, argue that the initial report should not be available to the public.[27] AT&T and BellSouth state that there will be insufficient time for the carrier to file a formal request for confidentiality of the initial report; therefore, these reports should routinely be treated as confidential. Southwestern points out that the initial reports may be inaccurate because they are rushed. USTA argues that making the reports public may result in their use in litigation for liability, thus inhibiting carriers from being candid in the first instance. Ameritech in its reply comments states that carriers will be extremely cautious in conveying information about an outage if they are not assured that their reports will be kept confidential. WilTel states that if an outage were caused by sabotage, the initial report may aid the saboteurs. Furthermore, Bell Atlantic, BellSouth, Centel, NYNEX, and Pacific suggest that any industry-wide dissemination of the reports should be done not by the Commission but by the NOF.[28] Conversely, D.C. asks that outage data received by the Commission be sent electronically to affected state commissions and to Bellcore, USTA, and other industry forums. MCI asks that the initial report be disseminated to the appropriate public authorities, governmental bodies with safety oversight, and other potentially affected carriers. New York and UTC propose that the reports be disseminated to affected state regulatory commissions. Additionally, UTC proposes that a public inspection file be maintained by the Commission indexed by carrier name. TCA urges that the reports be provided to relevant state commissions and that the Commission publish a monthly log summarizing outage reports, as well as semiannual analyses of these reports.

31. We reject the requests that the Initial or Final Service Disruption Report be routinely treated as confidential. First, telephone service outages have been of enormous public concern, in part because they have such a widespread public impact. The public is entitled to full and forthcoming explanations of these events. Concerns of potential litigation or aiding saboteurs resulting from disclosure are not supported. And while information in the Initial Service Disruption Report ultimately may prove incorrect, that is one of the reasons for requiring a Final Service Disruption Report 30 days later. To the extent that fear of potential embarrassment causes concerns of public disclosure, these concerns are unfounded. We have found that every major carrier admits to outage incidents over the last several years. Nor are telephone service outages unique to the United States; our inquiries show that they occur, and are a concern, in other developed countries as well.[29] We believe their causes and effects will best be minimized in an environment of full and candid disclosure. Second, Section 0.459 of the rules outlines the procedures to be followed by parties seeking confidential treatment for their submissions. We acknowledge AT&T's and BellSouth's concern that carriers will be hard-pressed to present a persuasive case for confidentiality given the short filing deadline. Section 0.459(b) requires a reason for the confidentiality request and the facts upon which the reason is based. We do not believe it unreasonable to require carriers to address these matters in their Initial Service Disruption Reports if they have a particularly persuasive basis upon which to request confidentiality. However, given the short filing deadline, we will look favorably on requests to supplement the showing required by Section 0.459 if such supplements are submitted expeditiously. We emphasize, however, that, as a general matter, we do not anticipate that there will be a basis for granting confidential treatment to the reports, and we will not look favorably upon carriers who make frivolous or overly-broad requests for confidential treatment in order to delay public release of the reports.

32. One of our purposes in requiring outage notification is to encourage and, where appropriate, to assist in the dissemination of information about the outage to affected service carriers, governmental agencies and the public. We will continue our practice of working closely with affected state and local regulatory authorities in the case of major outages. In particular, we will share information on the reports we receive with affected state regulatory commissions and the National Association of Regulatory Utility Commissioners, unless a specific report has been granted confidentiality or our rules do not yet permit disclosure. Although we decline in this proceeding to mandate carrier outage notifications and/or reports to particular industry organizations, we strongly encourage industry efforts to share information. Moreover, the information we receive on service outages will, to the extent consistent with our rules regarding confidentiality, be reviewed by the Network Reliability Council and made available to the public under current procedures.

33. **Notification to the National Coordinating Center (NCC)** - The NCC is a joint government-industry operation composed of representatives of the National Commu-

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[26] *See* Appendix A to Part 64 of the rules at § 6(b)(2)(j).

[27] Southwestern argues that the Final Service Disruption Report should also not be available to the public because the proper place for carriers to publicly disseminate information about the causes of outages is through press statements and industry forums where all parties can be represented.

[28] GTE concurs with this proposal, but suggests that the National Coordinating Center (NCC) or the Exchange Carriers Standards Association (ECSA) serve as the industry-wide disseminator. *See* para. 33, *infra*.

[29] This is the precise reason the ITU has decided to pursue information- sharing of network outage information within the CCITT (International Telegraph and Telephone Consultative Committee).

nications System (NCS)[30] and the telecommunications industry, working together to assist in providing an endurable national telecommunications system to satisfy the NS/EP telecommunications needs of the government. In his comments, the Manager of the NCS (MNCS) states that it would be impossible for the NCC to fulfill its NS/EP obligations if it did not continue to receive timely reports of outages.[31] Therefore, the MNCS states, the Initial Service Disruption Report proposed by the Commission should not serve as a substitute for the notifications now received by the NCC. Rather, MNCS requests, the Commission should ensure that a copy of the initial and final reports be forwarded to the NCC at the same time that they are submitted to the Commission.

34. The NCC plays a critical role in assuring that the nation's NS/EP telecommunications needs are safeguarded, and the Commission works closely with that agency. We do not intend that the outage reports to be filed with this Commission serve as a substitute for any reports filed with the NCC. However, we do believe that the outage reports we receive may be useful to the NCC in the furtherance of its mission to safeguard national government emergency telecommunications requirements. Therefore, we will provide NCC with copies of all Initial and Final Service Disruption Reports through our existing liaison channels. [32]

IV. CONCLUSION

35. In the NPRM we tentatively concluded that it was critical for the Commission to have a systematic real-time means by which to monitor significant telephone service outages throughout the nation. The comments have overwhelmingly supported this conclusion. Consistent with the Commission's objective to encourage the development of a competitive, innovative and excellent American communications system, and in response to the recent series of major outages, we are today adopting specific reporting requirements for outages potentially affecting 50,000 or more customers and lasting 30 or more minutes. (*See* Section 63.100 in Appendix B.) The information we receive will facilitate our monitoring the quality of service being provided, and enable us to take swift remedial action as required.

V. ORDERING CLAUSES

36. Accordingly, It Is Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 403, Part 63 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix B hereof, effective 30 days after publication in the Federal Register.[33]

37. It Is Further Ordered, that, the Secretary shall cause a summary of this *Report and Order* to be published in the Federal Register which shall include a statement describing how members of the public may obtain the complete text of this Commission decision. The Secretary shall also provide a copy of this *Report and Order* to each state utility commission.

38. It Is Further Ordered, that, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

Parties Filing Comments

Allnet Communication Services, Inc.
AT&T *
Ameritech Operating Companies *
Bell Atlantic Telephone Companies *
BellSouth Corporation *
California Bankers Clearing House Association *et al.* *
Cellular Telecommunications Industry Association **
Central Telephone Company
District of Columbia, Public Service Commission
GE American Communications, Inc.
GTE Service Corporation *
Iowa Network Services, Inc. *
John C. McDonald, President of MBX Inc.
Manager of the National Communications System *
MCI Telecommunications Corporation *
Metropolitan Fiber Systems, Inc. *
New York City Department of Telecommunications and Energy
Nynex Telephone Companies *
Pacific Bell and Nevada Bell *
Rochester Telephone Corporation *
Southern New England Telephone Company
Southwestern Bell Telephone Company *
Tele-Communications Association *
United States Telephone Association *
United Telephone System Companies **
U S West Communications, Inc. *

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[30] The NCS consists of representatives from twenty-three federal departments, agencies or entities which lease telecommunications facilities significant to national security and emergency preparedness (NS/EP). The mission of the NCS is to coordinate planning for and provision of NS/EP in all circumstances.

[31] The NCC receives notification of outages from the carriers pursuant to its charter. *See* NCC Operating Charter dated October 9, 1985.

[32] We make an exception to our confidentiality rules for purposes of the FCC providing NCC with copies of these reports. In light of the fact that NCC has national security functions and that it already receives reports of outages, we find that the public interest is served by our provision of the carriers' reports to NCC without any possible impediment because of confidentiality claims.

[33] Carriers are, of course, free to begin compliance with its provisions immediately.

US Sprint Communications Company **
Utilities Telecommunications Council
Williams Telecommunications Group, Inc. *

* also filed reply comments
** filed only reply comments

Appendix B

Title 47 of the Code of Federal Regulations, part 63, is amended as follows:

1. The authority citation for part 63 is revised to read as follows:

Authority: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. secs. 151, 154(i), 154(j), 201-205, 218 and 403, unless otherwise noted.

2. The title of part 63 is revised to read as follows:

PART 63 - EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

3. The table of contents for §§ 63.60 - 63.90 is amended by adding § 63.100 and by adding the word OUTAGE to read as follows:

DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT

* * * * *

63.100

4. The heading of §§ 63.60 - 63.100 is amended by adding the word OUTAGE to read as follows:

DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT

5. Part 63 is amended by adding § 63.100 to read as follows:

§ 63.100 NOTIFICATION OF SERVICE OUTAGE.

(a) Any local exchange or interexchange common carrier that operates transmission or switching facilities and provides access service or interstate or international telecommunications service, that experiences an outage which potentially affects 50,000 or more of its customers on any facilities which it owns or operates, must notify the Commission if such service outage continues for 30 or more minutes. Satellite carriers, cellular carriers, and competitive access providers are exempt from this reporting requirement. Notification must be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day in the FCC headquarters building in Washington, D.C., or on a secondary basis it may be served on the Commission's Watch Officer on duty at the FCC's facility at Grand Island, Nebraska. The notification must be by facsimile or other record means delivered within 90 minutes of the carrier's knowledge that the service outage potentially affects 50,000 or more customers, if the outage continues for 30 or more minutes. Notification shall identify a contact person who can provide further information, the telephone number at which the contact person can be reached, and what information is known at the time about the service outage including: (1) the date and estimated time of commencement of the outage; (2) the geographic area affected; (3) the estimated number of customers affected; (4) the types of services affected (*e.g.*, interexchange, local, cellular, 911 emergency services); (5) the duration of the outage, *i.e.*, time elapsed from the estimated commencement of the outage until restoration of full service; (6) the estimated number of blocked calls during the outage; (7) the apparent or known cause of the incident, including the name and type of equipment involved and the specific part of the network affected; (8) methods used to restore service; and (9) the steps taken to prevent recurrences of the outage. The report shall be captioned Initial Service Disruption Report. Lack of any of the above information shall not delay the filing of this Report. Not later than thirty days after the outage, the carrier shall file with the Chief, Common Carrier Bureau, a Final Service Disruption Report providing all available information on the service outage, including any information not contained in its Initial Service Disruption Report.

(b) As used in this section:

(1) "Outage" is defined as a significant degradation in the ability of a customer to establish and maintain a channel of communications as a result of failure in a carrier's network.

(2) "Customer" is defined as a user purchasing telecommunications service from a common carrier.

Statement of FCC Chairman Alfred C. Sikes

The action we are taking today to strengthen our investigative authority regarding telephone network failures needs to be put in context.

First, this action is one of a number of steps we have taken. Over past years we have established special reporting and quality measurement requirements. We have required long-distance carriers that experience outages to provide customer information on how to access other carriers. We have convened an international meeting of telecommunications authorities, and set in motion a process which will result in closer international cooperation on network reliability issues. We have established a telephone Network Reliability Council, composed of the chief executive officers of most U.S. telecommunications companies, user and consumer groups representatives, and a representative of the National Association of Regulatory Utility Commissioners (NARUC).

Second, the establishment of the FCC's Network Reliability Council anticipates additional steps. The addition steps, however, need to be taken following close consultation with the providers and users of telecommunications networks.

Issues dealing with traffic concentration, testing technology and procedures, technological advancements, alternative transmission paths, and the like do not yield to

quick answers with fully predictable consequences. The United States has a very good telephone network, and the Government must be careful to make sure its efforts improve on its performance.

Third, there are large users of telecommunications services who will seek to socialize the cost of what they should more properly obtain by careful purchasing and, if necessary, by purchasing backup or redundant capacity. I will certainly resist proposed solutions that add layer upon layer of costly government interventions -- and which drive up phone costs for everybody for the arguable benefit of the specialized users.

Finally, I am struck by the good fortune of U.S. telecommunications users. As I work with my counterparts in other countries on network reliability, the dependence of their users on a single network is all too clear. In the United States, through the efforts of the Federal Communications Commission (FCC), the Department of Justice, and the world's most diverse and competitive telecommunications business community, increasingly choice is the rule, not the exception.

The FCC will continue to work to expand choice. In the final analysis, that will be our greatest contribution to customers getting the reliability they want and need.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of service Disruptions.

This Order is a good beginning step in addressing network reliability concerns. The rules before us should serve to enhance network reliability by requiring carriers to report major outages. The initial outage information provided by the carriers should assist the FCC in investigating such incidents. In addition this information should serve to facilitate corrective actions, where necessary.

I view this order in conjunction with the Network Reliability Council as complementary steps in addressing network reliability concerns. This item asks the Network Reliability Council to further review the threshold reporting requirement and recommend to the Commission refinements on two specific threshold level issues. Specifically, after reviewing the present record I am interested in determining whether it would be appropriate for the Commission to adopt a separate threshold for reporting outages affecting threats to public safety such as 911 services or telephone related services at major airports. I am concerned that the current 50,000 threshold level may not adequately address these safety concerns. This examination highlights my appreciation for the public safety concerns and reaffirms my commitment that public safety concerns will not be compromised.

In addition, I expect the Council to carefully reexamine the 50,000 threshold level. I do believe that perhaps a lower threshold may better capture emergency outage incidents without overburdening either the Commission or the industry. I look forward to the Council's recommendation on this matter.

In light of these concerns, I am satisfied that this item is a good beginning step in addressing network reliability matters. This Order puts in place a solid framework for this agency to address network reliability issues. I am also aware that members of Congress share similar network reliability concerns and I look forward to working with them on this matter. I intend to monitor this process so as to guarantee a secure and reliable telephone system.

Separate Statement of Commissioner Ervin S. Duggan

In Re: Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions

Network reliability has been a special concern of mine for quite some time, even before the spate of network outages last summer and fall. The serious outages that the nation suffered last year heightened my personal concern and alerted all telephone users -- private businesses, government, and the general public -- that reliable telephone service is not guaranteed or automatic: that we must work to maintain it.

The rules that the Commission adopts today should enhance network reliability by requiring carriers to report major outages to the FCC during or immediately after an incident. This will enable us, in turn, to investigate and take whatever steps we can to prevent recurrences. I am well aware of the danger of straining limited Commission resources or of overreacting in an intrusive way. But there is an equal or greater danger: doing too little, especially when emergency services affecting public health and safety may be involved.

The Commission has already acted responsibly by creating a Network Reliability Council whose members are leaders in the local telephone and long distance industries, manufacturing and state regulation, or who represent customers. In this item, we ask for the Council's recommendations on two important questions -- whether to lower the threshold triggering the reporting of an outage, and whether a separate threshold should be adopted for reporting outages affecting 911 services or major airports.

I am interested in the Council's recommendation, and I am hopeful that they will answer both questions in the affirmative. My personal view is that the 50,000 customer interim threshold we adopt today will catch only the largest outages, and that we could lower it substantially without overburdening either Commission or industry resources. The FCC, furthermore, would not need to investigate every reported outage under this standard. Such reports, however, would help the FCC, the Network Reliability Council, the telecommunications industry, and major telephone users gain the knowledge we all need to protect against further outages. There is far more danger in knowing too little than in knowing too much.

More importantly, I am convinced that a lower threshold for reporting outages affecting airport, 911 and other emergency services may be vital to protect public health and safety, even though some see these services as purely state and local regulatory concerns. To begin with, some states are not equipped to handle real-time reporting of outages. It seems to me that we have a role to play in

gathering this information at least until the states are able to do it themselves. Second, the information we gather could be useful for all states, since they need to be aware of the vulnerabilities of network-based emergency services in general and could learn from the experiences of other states. Finally, if people die because they cannot get emergency service during a telephone outage, few observers will excuse inaction by the FCC on the ground that protecting 911 service is technically a state or local concern.

Ultimately, even though our judgment may be further informed by the Network Reliability Council, the responsibility is ours. Section 1 of the Communications Act clearly sets forth a mandate to the FCC "to make available...to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communication...."

While I support the actions that we take in this item, therefore, I remain acutely aware of the danger of doing -- and knowing -- too little. In recent months I have advanced two recommended actions beyond those that we are taking today: first, that the FCC launch a full-scale study of network security and vulnerability; second, that we establish a unit within the FCC, with functions akin to the National Transportation Safety Board, to investigate serious outages and network threats and to recommend ways to prevent recurrences.

Is either proposal overregulatory? No. All that they contemplate is that the FCC should obtain more and better *information* prior to any FCC action. And how can we function without information? We cannot take even narrow, targeted actions without knowledge. And without sufficient knowledge we could be stampeded into actions that might be reckless and illadvised.

For the moment, however, I am satisfied with the steps that we are taking. I look forward to getting the views of the Network Reliability Council. I have high regard for Paul Henson and his colleagues, and I look forward to working with them as we seek to guarantee a secure, strong and reliable telephone system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE TELEVISION TECHNICAL AND OPERATIONAL REQUIREMENTS — **MM Docket No. 91-169**

REVIEW OF THE TECHNICAL AND OPERATIONAL REQUIREMENTS OF PART 76, CABLE TELEVISION — **MM Docket No. 85-38**[1]

REPORT AND ORDER

Adopted: February 13, 1992; Released: March 4, 1992

By the Commission:

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I. INTRODUCTION

1. By this *Report and Order*, the Commission adopts new technical standards for cable television systems, applicable to all NTSC video (or similar video channel) downstream signals on all cable channels.[2] These new standards shall serve to define the basic technical quality of service cable subscribers are entitled to receive. As we stated in our report to Congress, *Report in MM Docket No. 89-600*, 5 FCC Rcd 4962 (1990) [*Cable Report*], technical quality is an ongoing concern not only of this Commission and cable subscribers, but also of local franchising authorities, who are permitted to consider "the quality of the operator's service, including signal quality," in the franchise renewal process.[3] Our new standards, which represent the first major revision of our cable television technical rules in over fifteen years, also take into account relevant changes in the American television household's typical equipment since the 1970s.[4]

II. BACKGROUND

2. In 1972, the Commission adopted technical standards to govern the signal quality of cable channels retransmitting broadcast programming (*i.e.*, class I channels).[5] *Cable Television Report and Order*, 36 FCC 2d 143,

[1] In response to the *Further Notice of Proposed Rule Making in MM Docket No. 85-38*, 3 FCC Rcd 5966 (1988), the Commission received comments from twenty-four parties, and reply comments from nine parties. We have maintained these prior comments as part of the record in this new proceeding. These commenters are listed in Appendix A.

[2] NTSC [National Television Systems Committee] video is the television signal standard used in the United States. Downstream signals are signals transmitted from a cable system's headend to subscriber terminals. Some cable systems disassemble the NTSC video signal during transmission. The disassembled signal is reassembled prior to its delivery to the cable subscriber. Although the reassembled video signal is not considered an NTSC video signal, it can be received and displayed by NTSC receivers.

[3] 47 U.S.C. §546(c)(1)(B).

[4] The new rules are set forth in Appendix C.

[5] The Commission has defined four classes of cable television channels. Class I channels are used to relay to subscriber terminals television broadcast programs obtained off-the-air, by microwave or by direct connection to a broadcast station. Class II channels deliver to subscriber terminals nonencoded

198, 204, *aff'd in part and modified in part*, 36 FCC 2d 326, 359, 364 (1972). Initially, the Commission permitted local franchising authorities to adopt and enforce stricter cable technical standards than the ones it promulgated. This approach, however, resulted in a variety of different standards adopted by local authorities, which created a significant degree of confusion and inefficiency in the industry. Consequently, in 1974 the Commission preempted the authority of state and local governments to set more stringent standards than the Commission. *Report and Order in Docket No. 20018*, 49 FCC 2d 470 (1974). In 1985, the Commission decided that it would no longer enforce its standards, but rather would retain them as voluntary guidelines that local authorities could include as requirements in their franchise agreements and could themselves enforce. The Commission's preemption of a local authority's power to adopt more stringent standards remained in effect. *Report and Order in MM Docket No. 85-38*, 102 FCC 2d 1372 (1985). This preemption was upheld by the Supreme Court. *City of New York v. FCC*, 486 U.S. 57 (1988).

3. Although the Commission initially anticipated setting additional standards for class II, III, and IV channels as the need developed, it determined in *Docket No. 20018*, *supra*, that standards for class II through IV channels could stifle the development of services using these channels, and that competitive forces would be a far more effective regulator of service quality for these channels. The Commission therefore did not adopt any standards or guidelines for class II through IV channels. Moreover, to ensure that technical innovation proceeded without unnecessary impediment, the Commission also preempted local authorities from imposing any technical standards for these channels. *See Docket No. 20018*, 49 FCC 2d at 477-480.

4. In 1985, the Commission again declined to set standards or guidelines for class II through IV cable channels and continued to preempt local franchising authorities from doing so. Franchising authorities appealed the decision, arguing that this preemption, coupled with the absence of federal quality standards for these channels, made it impossible for them to perform an analysis of whether a franchisee met its service obligations. Such a determination is required to be made by the franchising authority as part of franchise renewal proceedings, pursuant to the Cable Communications Policy Act of 1984 [Cable Act]. Finding merit in this argument, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Commission. *City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987). Responding to this remand, the Commission launched a further rulemaking proceeding in 1988, proposing to extend the Commission's voluntary technical guidelines for video signals carried on class I cable channels to cover video signals carried on class II and class III channels. *Further Notice of Proposed Rule Making in MM Docket No. 85-38*, *supra*. The Commission believed that the varied and experimental nature of nonvideo services carried on class III and class IV channels made defining standards for these services difficult, if not impossible. It also stated its continuing concern that such standards would stifle further development of new uses of cable technology. Consequently, no standards were proposed for nonvideo signals carried on class III and IV channels.

5. Shortly thereafter, pursuant to §623(h) of the Cable Act, the Commission issued a *Notice of Inquiry in MM Docket No. 89-600*, 5 FCC Rcd 362 (1989), to enable the Commission to develop a factual record to ascertain the effect of competition in the cable marketplace. Based upon this record,[6] the Commission in July 1990 issued its *Cable Report*, which it presented to Congress. Among the issues addressed in the *Cable Report* was cable service technical quality. The Commission found, based upon the evidence submitted in both *MM Docket No. 85-38*, *supra*, and in *MM Docket No. 89-600*, *supra*, "that there is a pattern of technical problems with cable service. "*Cable Report*, 5 FCC Rcd at 4990. The Commission further found "merit in the criticism of some municipal commenters that the [FCC's] standards are outdated and inadequate to assure subscribers a high quality picture." *Id.* at 5056. At the same time, the Commission reaffirmed its belief

> that uniformity of technical standards in the 27,000 communities with cable franchises is essential to prevent the inefficiency and confusion that threatened the cable industry during the period when local authorities (far fewer at that time) could set stricter standards than those promulgated by the Commission. Moreover, uniform standards would permit cable operators, program suppliers, and equipment manufacturers to take advantage of any economies of scale that might otherwise be lost if differing technical standards force them to customize their services or equipment to meet the requirements of a myriad of jurisdictions. As the cities themselves recognize, federal standard setting could also save the local authorities the expense associated with developing their own standards.

Id. In the *Cable Report*, the Commission further noted the ongoing inter-industry negotiations -- which included the cable industry and franchising authorities -- over cable technical standards. In recognition of those efforts, the Commission stated its intent to

> initiate an inter-industry advisory process, geared toward reaching consensus for revamping the specific standards for cable technical regulation, within the following framework:
>
> (a) The Commission intends to adopt mandatory technical standards for class I, II, and III video signals.

---

nonbroadcast cable programming, such as public access and cable originated services. Class III channels deliver to subscriber terminals encoded programming or signals that are intended for reception by equipment other than a television broadcast receiver (*i.e.*, nonvideo communications). Finally, class IV channels transmit signals of any type from a subscriber terminal to another point in the cable television system (thus providing two-way interactive capability). *See* 47 C.F.R. §76.5(r)-(u).

[6] The Commission received more than 180 comments and approximately 70 reply comments. Extensive supplemental information was also requested and received, and field hearings in three different cities were conducted.

(b) The Commission intends to preempt the power of local authorities to set technical standards for these signals more strict than the federally established ones.

(c) As a practical matter, the Commission will continue to rely on local franchising authorities as the first line of enforcement; with mandatory standards, however, the Commission will have enforcement responsibilities.

(d) For non-video transmissions carried on class III and IV channels, technical standards, to the extent they are necessary, should not be so restrictive as to stifle innovation and experimentation in this dynamically evolving area of new technology and service.

Id. at 5058-5059.

6. Although we indicated in the *Cable Report* that we would issue a notice of proposed rule making "[o]nce a consensus agreement is reached among the interested parties," *id.* at 5059, the inter-industry negotiations failed to produce a prompt agreement. Accordingly, believing that further delay in the commencement of Commission action would not serve the public interest, we issued the *Notice of Proposed Rule Making* in this proceeding on June 27, 1991. *Notice of Proposed Rule Making in MM Docket Nos. 91-169 and 85-38*, 6 FCC Rcd 3673 (1991).

7. In our *Notice*, we proposed in most cases to establish our existing guidelines as standards for all NTSC video downstream signals on all cable channels. We proposed, too, to eliminate guidelines for specific channel boundary requirements and for testing for terminal isolation. In addition, we recommended enhancing our requirements regarding visual signal strength levels and electromagnetic noise problems, and adding new standards generally for the delivery of color signals. We proposed to exempt systems serving fewer than 1000 subscribers from our technical standards, and to allow systems serving rural areas to negotiate certain lesser standards with their franchising authorities, but not below a specified minimum level. We recommended continuing our policy of allowing cable systems using specialized techniques or designs to operate at variance with one or more of our standards if the public interest would benefit. Finally, we proposed requirements for proof-of-performance testing, and also for resolving complaints primarily at the local level, involving the Commission only in the case of intractable problems that cannot be resolved locally.

8. In response to the *Notice*, the Commission has received comments from 38 parties. Among these comments is an inter-industry proposal for technical standards for cable television systems [Joint Agreement], filed jointly on October 17, 1991, by the National League of Cities, the United States Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, the National Cable Television Association [NCTA], and the Community Antenna Television Association. The Commission has also received comments on the Joint Agreement from 23 parties, pursuant to an *Order Granting Extension of Time in MM Docket Nos. 91-169 and 85-38*, 6 FCC Rcd 6588 (1991).[7]

III. SUMMARY OF CONCLUSIONS

9. It has been our objective in this proceeding to establish technical standards which will ensure that cable subscribers receive quality television service on all relevant classes of cable channels. As we stated in the *Cable Report*, establishment of such standards will also enable franchising authorities to fulfill their statutory responsibilities "to determine whether the signal quality of its franchisee's system overall merits franchise renewal." *Id.* at 5057. *See also* 47 U.S.C. §§521(5), 546(c)(1)(B). At the same time, we wish to ensure that whatever standards we adopt do not impede technological advances and experimentation by the cable industry.

10. We believe the technical standards for cable systems we promulgate today strike an appropriate balance in achieving these goals. We adopt these standards upon full and due deliberation on all comments received in response to our *Notice*, paying particular attention to the Joint Agreement and comments received upon it. Indeed, the Joint Agreement and our *Notice* are in harmony on many points, and this is reflected in our new rules.

11. It has been our experience, and the comments bear it out, that the majority of subscriber complaints concerning the technical quality of service relate to the following areas: (1) the strength of the signal delivered by the cable operator; (2) the amount of electromagnetic noise and unwanted system-generated by-products contained in the signal delivered; (3) the ability of the cable operator to maintain the system's equilibrium, so as to provide consistency for all the system's channels; (4) maintenance of the physical integrity of the cable system plant; (5) color-related quality problems that manifest themselves at a subscriber's terminal, such as the loss of highlights and detail in darker picture areas, color smearing, wrong color, and the like; and (6) the inability of the subscriber to utilize fully subscriber receiver functions, such as remote control and the television set's cable-ready tuner when connected to a cable television service.[8] The new rules we adopt today address the delivery of NTSC video downstream signals. They are crafted to resolve problems and improve service to subscribers in these areas. In some cases, we have eliminated existing guidelines, such as those for specific channel boundary requirements. In many cases, we have retained existing guidelines as standards, while in others -- notably those regarding electromagnetic noise problems -- we have increased the requirements compared with our existing guidelines. We also have added new standards addressing the delivery of color signals, as well as requirements for the delivery of closed captioned programming.

12. In keeping with our desire to implement uniform, nationwide standards, we are generally preempting local standards which differ from the standards we adopt today.

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[7] A list of these commenters is contained in Appendix B.

[8] Television receivers are regulated under Part 15 of our rules, since they are subscriber-owned premises equipment over which a cable operator has no control. Consequently, we stated our belief in the *Notice* that complaints regarding incompatibility of television receivers with cable systems, as well as direct pick-up problems, are beyond the scope of this proceeding. *Id.* at 3675 n. 9. This question is discussed in more detail in paragraph 66, *infra*.

We will, however, allow franchising authorities for cable systems serving low population density (*i.e.*, rural) communities to set certain lower technical standards. We will also permit franchising authorities for systems serving fewer than 1000 subscribers to set standards for such systems, so long as those standards do not exceed our own. Because local authorities are most familiar with the local system operation and plant, as well as any local factors which could affect the resolution of a problem, initial enforcement of our technical standards will generally take place at the local level. In this regard, cable systems will be required to have a process for resolving complaints about technical service. As a total package, we believe that our new rules will result in the provision of quality service to cable subscribers.

IV. CABLE TELEVISION TECHNICAL STANDARDS

Classes of Channels Affected

13. The technical standards contained in our new rules will be applicable, as we proposed in our *Notice*, to all NTSC video (or similar video channel) downstream signals -- that is, video signals transmitted from the cable headend to subscriber terminals -- on all cable channels. This expansion of the applicability of our rules beyond merely class I cable channels is also proposed by the Joint Agreement and is supported by commenters addressing the issue. We believe that extending the standards in this fashion comports with our objectives of ensuring that cable systems provide an acceptable level of quality of service to their subscribers, and that signal quality is uniform for all video channels on the cable system. As we stated previously, "since all these classes of cable channels share the same physical facility or conduit the quality of one class of channel can potentially affect the quality of the other channel classes." *MM Docket No. 85-38*, 3 FCC Rcd at 5969. We do not believe, therefore, that we should discriminate among video cable channels as to the quality of signal received.

14. The National Association of Broadcasters [NAB] and the Association for Maximum Service Television, Inc. urge that our technical standards apply to all signals (including broadcast), and that they be independent of the quality of source signals being received. We do not, however, believe that it is appropriate to require cable television systems otherwise meeting our standards to improve the quality of any signal received by the system. As several commenters have noted,[9] certain signals, notably those provided on access channels, are often of a lesser standard than those of commercial channels, yet provide a valuable public service. We agree that our technical standards should not be applied so as to prevent such programming from being carried by cable systems. We accordingly will not require cable operators to take extraordinary measures to improve upon signals over which the operator has no control.[10]

15. At the same time, we do expect the cable operator to take reasonable efforts and to use good engineering practices and proper equipment in the processing of each signal, guarding against any unnecessary degradation in the signal received and delivered to the subscriber. In addition, we encourage cable operators, as NAB suggests, to work with broadcasters and other program suppliers to resolve problems affecting a signal's quality prior to its reception at the cable headend. We further note that, in the case of encoded signals, signal performance will be measured after decoding and related processing occurs. We believe that this balanced approach will further the efficiency of franchising authorities, as well as this Commission, in meeting their statutory responsibilities for monitoring signal quality and for ensuring compliance with existing regulations in this area.

16. Upon examination of all comments, we continue to believe that creating technical standards for non-NTSC video signals offered on class III and class IV cable channels would be premature. No commenter has proposed any specific standards for such signals. In addition, given the wide variety of services offered on these channels, it would be extremely difficult to develop uniform and readily administered standards at this time that would not stifle continuing innovation and experimentation in this field, which we are statutorily required to promote.[11] Moreover, we observe that such standards would in any event add very little to video signal quality, since such standards are not generally needed for the proper delivery of downstream video signals. Finally, we note that technical problems affecting many of these signals --*e.g.*, pay channel and pay-per-view information -- will most often have an immediate impact on the revenues of the cable operator, who will thus have a distinct incentive to fix any such problems without government regulations.

17. We also believe that it is premature to create technical standards for cable delivery of high definition television [HDTV] signals. Tests for HDTV systems are still being conducted, and this Commission has yet to select an HDTV standard. In addition, if HDTV delivery employs digital transmission techniques, the parameters for technical standards in such a case may be vastly different than those for analog NTSC signals. Of course, we retain the authority, as noted by the Navy Broadcasting Service, to address this issue at a later time should the adoption of technical standards for cable delivery of HDTV signals appear necessary or desirable.[12]

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[9] Miami Valley Cable Council, the Multnomah Cable Regulatory Council [MCRC], the National Federation of Local Cable Programmers [NFLCP], and Rock Associates.

[10] For example, if a satellite signal received by the cable operator does not meet the color standards that are required, we do not expect the operator to improve upon the color parameters of the signal so that it will meet our standards after processing by the cable operator. In these instances, the cable operator must include a statement with each proof-of-performance record explaining the reasons why the signal on that particular channel does not meet one or more of our standards, and the operator must identify the measured levels of these standards as received prior to processing.

[11] *See* 47 U.S.C. §521.

[12] Several commenters, including the Navy Broadcasting Service, ask us to set a schedule of three to five years to reexamine all cable technical requirements. We believe that a set schedule for the review of cable technical standards is not necessary. However, we will closely watch the technical state of the industry and, if necessary, we will revisit or modify these standards to ensure that a quality signal is delivered to the home.

Channel Boundary Requirements

18. We proposed in our *Notice* to eliminate from our rules the specific channel boundary requirements and the stability requirement we previously adopted for cable converters. We tentatively concluded that, since the initial adoption of rules and guidelines for cable television technical service, converter and television tuner technology has improved to such an extent that we no longer need rules regarding the stability of converters or specific channel boundary guidance. We proposed only to require that the cable operator deliver a signal that is usable by a subscriber with an NTSC television receiver.

19. The Joint Agreement concurs with our proposal, as does MCRC. The New York State Commission on Cable Television [NYSCCT] opposes this elimination, asserting that a channel drifting more than 100 KHz from its assigned frequency can cause the upper adjacent channel to display visual beats caused by the lower channel aural carrier, which may not be filtered out by nonbaseband converters. However, NYSCCT is the sole commenter to raise this issue, and it submits no evidence to demonstrate the number of subscribers affected by or the severity of this possible problem.

20. Based upon the record in this proceeding, we believe that signal quality will be adequately protected if we simply require that the signals provided to a subscriber must be able to be received by the subscriber's television set or cable system terminal device. Most cable converters in use are quite sophisticated, combining numerous scrambling and control functions, which dictate a high degree of stability. Moreover, even older integrated electronic converters (*e.g.*, those ten to fifteen years old) are quite stable. Finally, we note that there are more cable-ready television receivers being sold than those that are not cable-ready. These factors together persuade us that our channel boundary requirements and stability requirement for cable converters are no longer necessary. In response to the request of InterMedia Partners, L.P. [Intermedia] for clarification to ensure that we will not require an operator to place off-the-air signals on channels 2 through 13 or furnish converters to each subscriber, the rule we adopt today will only require that the cable operator provide a signal that can be received and displayed on the cable subscriber's television set with consumer NTSC-format TV receivers. For subscriber-owned devices where converters are not necessary for the reception and display of cable delivered signals (*e.g.*, cable-ready television sets or VCRs), no converters need be supplied by the cable operator.

Aural Standards

21. While we stated our belief in the *Notice* that "existing technical guidelines for sound quality would be adequate," *id.* at 3676, we did propose two standards for audio factors that may affect video signal quality. Specifically, to control interference within a cable system, we proposed that the aural carrier level on all channels be between 13 and 17 dB below the associated visual carrier level, and that the aural center frequency be 4.5 MHz ± 5 kHz above the frequency of the visual carrier.

22. The Joint Agreement concurs with these levels, while proposing an exemption for scrambling technologies and transmission paths. This exemption would be based upon the equipment manufacturer's specified operating parameters, although it would still require the cable operator to avoid causing interference or distortion. Regal Technologies, Ltd. and other commenters raise concerns over meeting the proposed aural carrier level standard if a system is using traps. InterMedia suggests that the rms voltage differential be set at between 10 and 17 dB below the associated visual carrier level to allow cable operators the option of improving the transmission of stereo television sound by increasing the aural power levels.

23. We believe that the concerns raised by the Joint Agreement and InterMedia are valid, and that these concerns will be accommodated by setting the rms voltage differential parameters at between 10 and 17 dB below the associated visual carrier level. However, the aural carrier levels must be maintained so as not to cause interference to the upper adjacent channel. With regard to the Joint Agreement's concern for manufacturer designs which may require different voltages, it is our intention to permit specially designed systems to operate at variance with some of our standards if an adequate showing is made to the Commission establishing that the public interest will benefit. *See* paragraphs 60-61, *infra*.

24. NYSCCT and the Cities of Tallahassee, Florida and Washington, D.C. support the Commission's proposal with respect to the aural center frequency, while Isaac S. Blonder notes that the International Electrotechnical Commission [IEC] standard is 4.5 MHz ± 2 kHz. The Commission has determined, however, that a 4.5 MHz ± 5 kHz standard is necessary to accommodate the cable industry's use of baseband converters. *Viacom Cablevision of Wisconsin, Inc.*, 50 RR 2d 1558 (1982). Given the widespread use of such converters and other cable equipment that is designed around this standard, we shall set our aural center frequency standard at 4.5 MHz ± 5 kHz. We note that this standard has been used in the industry for over a decade, and that it adequately protects the quality of video signals. We also believe that the suggestion in the Joint Agreement and by the State of Hawaii that the aural center frequency be measured both at the output of the modulating or processing equipment center (generally the headend), as well as at the subscriber terminal, has merit, and we will adopt it.

Visual Signal Level Standards

25. As we stated in our *Notice*, there are a number of factors we must take into consideration with respect to the visual signal level that should be provided to cable subscribers. In evaluating the adoption of visual signal level standards, we recognize that the American household's typical television equipment has changed markedly since technical standards for cable systems were first proposed. In the early 1970s, most television households had a single television set, usually black-and-white, and VCRs were nonexistent. Cable systems were designed accordingly. Today, however, some two decades later, close to 70% of television households have VCRs, and the average number of television sets in a household is two.[13] In addition, a significant percentage of television sets in use

[13] Television Bureau of Advertising, Inc., "Trends in VCR Usage," April 1990, pp. 3-6.

are now 26 inches or larger diagonally, and black-and-white sets are uncommon. Notably, signal degradation is more noticeable to cable subscribers on larger and on color sets.

26. We believe that we must take the foregoing factors into consideration in setting technical standards for cable television service. However, we must also ensure that the signal provided does not overload subscribers' receivers. Moreover, we are aware that cable system operators may incur significant costs if they are required to achieve a stronger visual signal level. We believe that the rule we adopt today properly balances these various factors and concerns.

27. In our *Notice*, we proposed to increase the required signal strength by 6 dB for the visual signal level, and thus set a new standard of 6 dBmV (2 millivolts across an impedance of 75 ohms) at the subscriber terminal or cable interface device. This would, we noted, compensate for the decrease of signal strength caused by a signal passing through a VCR to a television set, as well as the additional cabling required for a household's second set. Several commenters, including NYSCCT, NAB, and the Electronic Industries Association Consumer Electronics Group [EIA CEG], support this proposal.[14] The Joint Agreement, however, proposes a standard of 3 dBmV (1.41 millivolts across an impedance of 75 ohms), measured at the end of a 100-foot cable test drop from the subscriber tap, and no less than 0 dBmV (1 millivolt across an impedance of 75 ohms) at each subscriber terminal. The parties to the Joint Agreement argue in support of this proposal that most cable systems are not designed to deliver a 6 dBmV signal to subscriber terminals, and that it would entail significant costs to upgrade cable systems to a 6 dBmV level. They also suggest that there is a risk of overload and contend that 0 dBmV is "perfectly acceptable" to serve a single television set, citing the *Notice* at 3676.

28. Certain commenters, such as the State of Hawaii and the State of New Jersey Board of Regulatory Commissioners [NJBRC], also suggest that it is sufficient to require a level of 0 dBmV at each subscriber terminal, as proposed by the Joint Agreement. Cable industry commenters generally contend that an increase to 6 dBmV at the subscriber terminal would: 1) force costly rebuilds, with costs ultimately being passed on to the consumer;[15] 2) create increased signal leakage levels, resulting in an increased potential of interference from cable operators to over-the-air users; 3) cause television receiver distortion problems on certain portions of the cable plant; 4) not substantially improve signal quality at the subscriber terminal when combined with the proposed standard of 43 dB signal level to noise ratio; 5) create an undesired effect of capping channel capacity at a low number, due to channel loading concerns on cable system equipment; and 6) not meet our stated objective, because a noisy picture may still be provided to the subscriber at the higher signal level if the measurements are to be made at the subscriber terminal. Several commenters also object to requiring cable operators to accommodate for home devices owned by the subscriber.

29. Some commenters, such as Armstrong Utilities, Inc. [AUI] and Archer S. Taylor, suggest the possibility of a level between 0 dBmV and 6 dBmV, measured at a point outside the home to account for VCRs or splitters. Isaac S. Blonder notes that the IEC standard is -3 dBmV for 30-300 MHz, and 0 dBmV for 300-1000 MHz at the subscriber's television set. InterMedia suggests a 3 dBmV standard by the year 2002, while the Sacramento Metropolitan Cable Television Commission [SMCTC] suggests a 6 dBmV standard within 15 years or upon completion of a system's rebuild. A number of commenters, notably the Cities of Tallahassee and Washington, have stated that their existing cable systems already meet or approach the proposed visual signal level standard of our *Notice*.

30. Based on complete and careful consideration of the record before us, we shall adopt the Joint Agreement's proposal. In particular, we shall require a visual signal level of 3 dBmV (1.41 millivolts across an impedance of 75 ohms) as measured at the end of a 100-foot cable drop that is connected to the subscriber tap, and no less than a visual signal level of 0 dBmV (1 millivolt across an impedance of 75 ohms) at any subscriber terminal.[16] We find that this standard will ensure quality service to subscribers and, by guaranteeing a minimum level of 0 dBmV at a subscriber's terminal (which we have recognized is perfectly acceptable for a given television set, *Notice* at 3676), will accommodate for the attenuation of signal strength that occurs when a signal passes through a VCR. We emphasize that the level of 0 dBmV at a subscriber's terminal is a minimum level. In many cases, the visual signal level delivered to a subscriber's terminal will be higher. Consequently, the visual signal level standard we adopt today, in conjunction with our other standards, should rectify the vast majority of subscriber complaints concerning signal quality.[17] Providing this signal level at each subscriber terminal will also, compared with the 6 dBmV standard proposed in our *Notice*: 1) lessen the financial impact upon cable systems that were designed for lesser levels; 2) relieve the likelihood of exacerbated signal leakage; and 3) ease channel loading concerns. In addition, our adopted standard will avoid concerns over overload distortion raised in response to the proposed 6 dBmV level. We accordingly conclude that the new standard properly balances all the concerns surrounding the establishment of a visual signal level requirement.

31. Finally, with respect to the visual signal level, an important attribute of cable-delivered signals is the consistency of signal level and quality among the numerous channels on the system. Our *Notice* proposed that, during any 24-hour period, each channel's visual signal level should be within a range of 12 dB, and that the level should be maintained within 3 dB of that of any adjacent channel and within 12 dB of any other channel (the "24-hour test"). Furthermore, we proposed that the signal

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[14] EIA CEG also proposes a maximum limit of 20 dBmV, an objective standard that has not been finalized by the EIA-NCTA Joint Engineering Committee Cable Interface Working Group.

[15] For example, TeleCable Corporation states that it would cost in excess of $178 million to rebuild its 12,600 miles of plant to meet this standard, while InterMedia states that an "electronic upgrade" to a cable system costs $3000 to $5000 per mile.

[16] For this purpose, a subscriber terminal is a terminal maintained and serviced by a cable operator.

[17] We will also provide a formula for cable systems that have impedances other than 75 ohms.

levels not overload the subscriber's receiver. These standards are easily achievable and should, if adhered to, remedy a majority of cable subscribers' complaints.

32. The Joint Agreement proposes a somewhat more rigorous standard: a range of 8 dB for each channel's visual signal level, to be maintained within 3 dB of that of any adjacent channel, and within 10 dB of any other channel for systems with cable distribution system upper frequency limits as far as 300 MHz, with a 1 dB increase for each additional 100 MHz above 300 MHz. MCRC proposes a similarly more rigorous standard. The Joint Agreement also proposes that the 24-hour test be performed hourly during two 24-hour periods, one in the warmest month in the system's service area and one in the coldest month.

33. We will accept the Joint Agreement's more rigorous standards, although in performing the twice-yearly tests we believe that measurements need only be taken four times per day. In addition, we will require that tests for this standard be performed after descrambling (*see* paragraph 15, *supra*). However, in response to comments from the City of Sunnyvale, California and SMCTC that these ratios should only apply when scrambling equipment is not turned on, we will consider allowing testing of equipment by interested parties (such as manufacturers or cable system operators) with the scrambling system turned off if an adequate showing of benefit to the public interest is provided.

Amplitude Characteristic

34. Adherence to an amplitude characteristic standard ensures quality of service by preventing loss of resolution and by avoiding anomalous picture impairments. Deviation from this standard can cause picture impairments such as streaking, smearing, and color errors. Additionally, the standard maintains the relative order of the different components in the television waveform, which will generally ensure a higher quality picture.

35. The *Notice* proposed that the operator measure the frequency response across the entire 6 MHz channel bandwidth, and that the frequency response not vary by more than ± 2 dB across the 6 MHz channel. The Joint Agreement concurs. However, several commenters, including SMCTC, Regal Technologies, Ltd., and Archer S. Taylor, state that the frequency band for this measurement should be scaled back to the Commission's earlier requirement of 0.75 MHz to 5.0 MHz because of design considerations of current systems and some AM fiber optic transmission systems. Additionally, the commenters generally state that this reduction in the frequency band would have minimal impact on signal quality. Other commenters and several cable trap manufacturers state that the adoption of the proposed standard would render "tens of millions" of traps unusable and would force operators to convert to more expensive scrambling devices.[18] They generally suggest that the effects of these traps should be taken into consideration for this standard or that measurements be made prior to the trap.

36. We are persuaded by the comments that we should modify our proposal on the amplitude characteristic for two reasons. First, we agree that scaling back the frequency band for measurement will not impair our objective of improved signal quality, and at the same time will promote technological advances in the cable industry. Accordingly, we shall establish as a standard our current guideline, requiring that the amplitude characteristic be maintained within a range of ± 2 dB from 0.75 MHz to 5.0 MHz above the lower channel boundary limit. We have also carefully reviewed the issue of traps and their impact on both cable operators and signal quality. While we continue to believe that the use of traps will degrade signal quality, we recognize that they are an effective and inexpensive means of controlling access to premium services on a channel-by-channel basis. We are also aware that traps remain one of the most consumer-friendly devices used by the cable operator, because their use does not inhibit the use of television receiver functions (*eg.*,remote control, picture-in-picture). Further, the existence of millions of these devices and the financial burden for their replacement, especially on smaller cable operators, would be significantly burdensome for the cable industry. Accordingly, for systems that use traps or similar devices, we will allow measurements for the channels using the traps to be performed before the traps. However, a written statement detailing the signal degradation effect of these devices must be attached to each of the cable operator's proof-of-performance records, as certified by the system engineer or the equipment manufacturer.

Signal Level to Noise Ratio

37. The visual signal level to undesired noise ratio (C/N) is a key factor in the signal quality of a TV picture. The C/N is the level of the desired signal above the level of undesired noise in the delivered picture. The higher the ratio, the better quality the picture. For example, a good NTSC television picture should have a C/N of 43 dB or better. We believe that this parameter is critical to the quality of the picture received by cable subscribers, and we reiterate that there is merit to the criticism that our standards in this regard need to be improved in order to assure provision of a high quality picture to cable subscribers. *See Cable Report*, 5 FCC Rcd at 5056.

38. For years, our rules and guidelines set a C/N standard of 36 dB, approximating a Television Allocation Study Organization [TASO] Grade 3 picture: a passable picture, indicating acceptable quality with perceptible but not objectionable impairment. Industry system design generally recommends a C/N of 43 dB or better, approximating a TASO Grade 2 picture: a fine picture, indicating a picture of high enough quality to provide enjoyable viewing with impairment just perceptible. In our *Notice*, we proposed to increase the C/N by 7 dB, from 36 dB to 43 dB. As we stated in the *Notice*,

> this approximates a one TASO grade increase from TASO Grade 3 to TASO Grade 2. This single augmentation of our standards would contribute vastly toward improving the quality of signal delivered by a cable operator, and should reduce significantly subscriber signal quality complaints. A well-designed cable system with average maintenance can meet this standard.

[18] A trap is an inexpensive filter, generally used to control the delivery of a premium service.

Id. at 3677. Most commenters and the Joint Agreement concur with our initial recommendation. The Joint Agreement, however, proposes a four-year phase-in of this standard for franchises not currently requiring it, and some commenters proposed phase-in periods of up to 15 years. Further, under the Joint Agreement's proposal, cable systems would be required to achieve a 40 dB C/N ratio within one year, and 43 dB C/N within four years. The Joint Agreement also proposes a 1 dB improvement in this standard if a converter is provided by the system operator. In addition, several commenters, including AUI and InterMedia, suggest that a lesser C/N level be permitted for rural systems, while NYSCCT proposes a C/N of 45 dB for urban systems.

39. The record supports our proposal to adopt a 43 dB C/N standard. Furthermore, we believe that it would be prudent to achieve a standard of 43 dB C/N as soon as possible given the importance of this standard to picture quality. However, as the record generally indicates, cable operators need some time to modify their systems to meet this standard. In this regard we agree with the Joint Agreement's suggestion that cable systems should be required to implement an incremental increase to 40 dB at the end of one year. We believe, however, that a four-year period to achieve 43 dB C/N is too long, and that a 43 dB level could be achieved in three years without imposing undue burdens upon the cable industry, particularly since many commenters state that 43 dB C/N is being met currently.[19] Therefore, we will require cable systems to meet a C/N level of 36 dB on the effective date of this possible order. One year after the effective date of this order, cable systems must meet a C/N level of 40 dB. Three years after the effective date, cable systems must meet a C/N level of 43 dB. *See* paragraph 69, *infra*.

Signal Level to Coherent Disturbances Ratio

40. Our *Notice* also proposed that the ratio of visual signal level to coherent disturbances be increased from our present guidelines of not less than 46 dB to a standard of not less than 53 dB for noncoherent channel systems. For coherent channel systems, we proposed that the ratio of visual signal level to coherent disturbances should be not less than 47 dB. NYSCCT suggests applying a 53 dB standard to both coherent and noncoherent channel systems. The Joint Agreement essentially concurs with our proposal, recommending standards of not less than 51 dB for noncoherent channel systems and not less than 47 dB for coherent channel systems, with testing conducted on a modulated and time-averaged basis to avoid shutting down completely for testing certain systems.

41. Recognizing that the effect of this standard on the television picture is highly subjective, and acknowledging the difficulties involved in measuring this standard, we shall adopt the Joint Agreement's proposal. We believe that this proposal meets the Commission's objective of ensuring quality service to subscribers. Indeed, we note that the Joint Agreement proposes a standard identical to ours (47 dB) for coherent channel systems, and only a slightly less rigorous standard (51 dB instead of 53 dB) for noncoherent channel systems. We believe that the proposed reduction of 2 dB from our proposal for noncoherent channel systems will have little impact on signal quality and is acceptable. Additionally, the measurement method suggested by the Joint Agreement is reasonable and would satisfy our concerns relating to the method of measurements. However, we will modify our requirements to allow a higher interference level only for coherent systems whose frequency products are frequency coincident with the visual carriers. Keeping the same interference level for all cable systems, even those in which disturbances are subjectively masked and thus generally cannot be seen by the subscriber, adds an unnecessary burden upon cable operators.

Terminal Isolation

42. The quality of terminal isolation equipment utilized by the cable industry has proven over the past decade to be stable and acceptable. Our *Notice* therefore proposed that, in lieu of periodic testing, terminal isolation equipment may rely upon specifications provided by the manufacturer that the equipment will provide to each subscriber terminal isolation of not less than 18 dB, and shall, in any event, be sufficient to prevent reflections from producing visible impairments at any other subscriber terminal. The Joint Agreement agrees with this proposal. Isaac S. Blonder notes that the IEC standard is 22 dB, and a number of commenters seek clarifications regarding subscriber-owned equipment.

43. We shall adopt the rule as proposed by our *Notice* and supported by most commenters and by the Joint Agreement. As we have previously observed, this approach will remove a testing burden from cable system operators, while ensuring that cable subscribers receive a quality signal. We emphasize that our new rule applies only to subscriber terminal equipment supplied by cable operators. Subscriber-owned equipment is regulated under Part 15 of our rules.

Hum Modulations

44. Low frequency disturbances, or hum modulations (hum), generally manifest themselves in the form of horizontal bars running across a television screen. Hum is typically introduced into the cable signal from the electrical powering of the cable system amplifiers. In our *Notice*, we stated that "[m]ost systems are designed for hum disturbances of between 2% and 4%." *Id.* at 3678. Our *Notice* proposed a standard for hum disturbances of.

45. The Joint Agreement concurs with our proposed hum standard. Most municipal commenters indicate that their systems already meet this standard. However, several commenters, notably InterMedia and SMCTC, strongly urge adoption of a 4% or 5% standard, given the just-perceptible possible presence of such disturbances at the 5% level and the expense of improvements to a lesser level. InterMedia also suggests an alternate testing method, while SMCTC and the City of Sunnyvale suggest modifying broadcasting standards for hum modulations to allow operators more easily to meet the proposed level.

46. Based upon the record, we will adopt the standard as proposed. We believe, however, that changing broadcasting standards, as suggested by SMCTC and the City of Sunnyvale, is beyond the scope of this proceeding. As previously discussed, the cable operator is only expected

[19] We are also rejecting the suggestion of a 1 dB improvement due to the use of the converters. Such an additional requirement over and above the 43 dB C/N level has not been justified by parties to the Joint Agreement or by any other commenter.

to process the signals that it receives with proper equipment and good engineering practices.[20] Therefore, if a broadcast signal received by the cable operator causes the operator to exceed the requirement as adopted, the cable operator is not required to improve the hum modulation levels on that signal. Nonetheless, in those instances, a certification by the cable system engineer must be attached to each proof-of-performance report regarding the lesser level received. *See* paragraphs 56-59, *infra*.

Color Signals

47. We proposed in our *Notice* to adopt three standards regarding the color portion of a television signal. These standards concern differential gain, differential phase, and chrominance-luminance delay inequality (chroma delay). Differential gain is a measurement used to determine the change in amplitude of the chrominance signal relative to the amplitude of the associated luminance signal. To the viewer, a poor differential gain in the system would show up as a color change when an object travels from a dark portion of the picture to a light portion; *e.g.*, a red sports car's color would change as it goes from a shaded to a sunny area. Related to differential gain is differential phase. This is a measurement used to determine the phase change in the chrominance signal relative to the amplitude of the luminance signal. It would manifest itself as a variation in hue as the intensity of the picture changes from dark to light; *e.g.*, a person's face might change its tint when moving from a dark area of a room to a brightly lit area of the room. Chroma delay distortion occurs when a delay is introduced into the chrominance portion of the color signal without an equal delay being introduced into the luminance portion. The result is a misregistration of the color and black and white portions of the picture. Simply stated, the viewer would generally see red colors smearing into white or light-colored backgrounds, or would sometimes see color ghosting in the television picture.

48. In our *Notice*, we proposed to adopt standards requiring that the levels of differential gain measured at the headend be no greater than 20%, that the level of differential phase measured at the headend not exceed 5, and that the chroma delay introduced into a cable television system not exceed 150 nanoseconds measured at the subscriber terminal. The Joint Agreement essentially concurs with these suggested standards. It proposes an identical 20% differential gain standard, a 10 differential phase standard, and a 170 nanoseconds chroma delay standard, each as measured at the headend. The Joint Agreement also suggests a staggered implementation period for these standards of up to three years, based upon the time zone location of the cable system.[21] Additionally, it proposes that tests only be performed once every 48 months after the first test.

49. Most commenters support our proposal to add color signal standards to our rules. Also, a majority of the commenters representing municipalities agree with the standards as proposed. However, some cable operators voice concerns regarding applying color standards to broadcast signals which may have lesser standards. Other commenters suggest a slight reduction in the standards and recommend that all the measurements for color standards be made at the headend. Archer S. Taylor suggests that the chroma delay measurement be limited to the headend as well to avoid confusion with phase shifts in duplex filters in the distribution network, while General Instrument Corporation maintains that the record in this proceeding is insufficient to develop a chroma delay standard. Isaac S. Blonder notes that IEC standards generally are more stringent than those we proposed.

50. We believe the standards suggested by the Joint Agreement will ensure accurate color delivery of signals. We recognized in our *Notice* that "[s]ubjective tests indicate that a differential phase of 10 to 15 degrees is just perceptible with maximum tolerable levels," *id.* at 3679,[22] and we note the comments of parties to the Joint Agreement that "chroma delay even at 400 ns is barely perceptible by viewers." The 10 differential phase standard and the 170 ns chroma delay standard contemplated by the Joint Agreement are therefore acceptable. The suggestion to measure for chroma delay at the headend to avoid confusion with other phase shifting devices in the cable distribution plant also has merit and will be adopted. However, we reject the Joint Agreement's suggestion for a staggered implementation schedule for these standards based upon a system's location in a particular time zone. This approach appears unnecessarily limiting, and is not supported by the record. We believe that a general three-year phase-in period not tied to any particular geographic area will better serve the public interest by allowing implementation of the new standards across the country as a whole. We further believe that a three-year period will allow system operators sufficient time to obtain the proper color testing equipment to perform these tests. Of course, in view of the recognition by parties to the Joint Agreement that swifter compliance is feasible on the part of many systems, we encourage all cable systems to meet these standards as expeditiously as possible.

51. Additionally, we conclude that the four-year interval between tests for color signals proposed in the Joint Agreement is too long, and that color measurements should be performed once every three years. This shorter interval will ensure that equipment is properly maintained and that malfunctions are repaired on a more timely basis. With regard to the delivery of signals received by the cable operator that may not meet these standards, we reiterate that cable operators are not expected to improve upon the signals they receive to meet this requirement.

52. In sum, we adopt today the following color signal standards, as measured at the output of modulating or processing equipment (generally the headend): 1) the level of differential gain shall be no greater than 20%; 2) the level of differential phase shall not exceed 10 degrees; and 3) the chroma delay shall be within 170 nanoseconds. The implementation date of these standards shall be three years from the effective date of this order, and tests shall be performed once every three years thereafter.

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[20] *See* paragraphs 14-15, *supra*.

[21] Systems in the Pacific and Mountain time zones, Alaska, Hawaii, and United States territories and possessions would be required to comply within one year; systems in the Central time zone within two years; and those in the eastern time zone within three years.

[22] SMCTC also urges a 10 standard as no more stringent than that required of television broadcast signals. This is consistent with the Joint Agreement proposal.

Testing Requirements

53. In establishing technical standards for cable television systems with 1000 or more subscribers, we are including proof-of-performance requirements encompassing these standards. Specifically, it will be the responsibility of the cable system operator to conduct performance tests that will offer reasonable assurance that the system is performing in such a manner as to achieve our goal of quality service. We proposed in our *Notice* that performance tests be conducted annually on each channel at a minimum of six points within each mechanically continuous set of cables within the system, and that the resulting test data be maintained at the operator's local business office for a minimum of five years.

54. Parties to the Joint Agreement propose a program of semiannual tests on a minimum of four channels -- although each channel would be tested for compliance with rms voltage level and visual signal level standards, as well as the 24-hour test -- with one additional channel to be tested for each 100 MHz of distribution system upper frequency limit. Tests would be conducted at a minimum of six points within the system, with an additional test point to be added for each additional 12,500 subscribers. Test data would be maintained locally for a minimum of five years. The Joint Agreement also sets forth a process by which franchising authorities and cable operators may negotiate to determine which channels will be tested, and a process by which franchising authorities may conduct tests on additional channels. The Joint Agreement further proposes noncompliance testing and a review process with the local authorities, and it contains provisions for reimbursement for tests performed by local authorities.

55. Most commenters agree that requiring six measurement points when conducting performance tests is more reasonable than our previous requirement of only three points. Some commenters suggest that the number of measurement points should be based upon physical system size (*e.g.*, miles of plant), and others simply believe that more measurement points than six are required. Numerous commenters also suggest more frequent proof-of-performance intervals. Montgomery County, Maryland also recommends that the test points be at the ground block, or at a tap with an equivalent type and length of cable.

56. We shall accept the Joint Agreement's proposal for proof-of-performance testing, including its proposal that the number of test points be based upon the number of subscribers. Requiring additional testing points for larger systems will also provide a more accurate survey of system performance. To some degree, this methodology is similar in concept to the process of determining the number of measuring points in other technical areas, such as determining field strength contours.[23] Accordingly, we shall adopt the Joint Agreement's proposal on this point. At the same time, we shall require, as proposed in our *Notice*, that at least six points be measured within each mechanically continuous set of cables in the system. This procedure will ensure that sufficient tests are performed throughout a system no matter what its configuration. We are also slightly adjusting the frequency scales proposed by the Joint Agreement to accommodate cable systems with upper frequency limits of 216 MHz. Measurements shall be made on at least four channels, plus one additional channel for every 100 MHz or fraction thereof of cable distribution system upper frequency limit above 100 MHz (*e.g.*, system upper frequency limit of 100 MHz = four channels; frequency limit of 101-216 MHz = five channels; frequency limit of 217-300 MHz = six channels; frequency limit of 300-400 MHz = seven channels, *etc.*). However, cable systems with upper frequency limits of 216 MHz need only make measurements on five channels.

57. We further believe that requiring semiannual tests, as the Joint Agreement suggests, will contribute further to ensuring that cable operators provide their subscribers with quality service, addressing most commenters' concerns. The noncompliance testing and review procedures suggested by the Joint Agreement, however, should be addressed at the local level by the cable operator and local franchising authority, and we decline at this time to adopt rules in this area. At the same time, we emphasize, as we stated in our *Notice*, that cable systems are obligated to meet all of our standards on all NTSC video (or similar video) downstream signals on a continuing basis, and that we shall randomly sample cable systems to ascertain the general level of compliance with our standards by the cable industry. Cable systems not complying with our standards will be subject to monetary forfeitures and sanctions in appropriate circumstances. Moreover, should we find that noncompliance is a pervasive problem, we will increase our enforcement efforts. *See also* paragraph 82, *infra*.

58. As noted above, numerous commenters suggest various locations for measuring different technical standards. They assert that measuring points other than at the subscriber terminal will provide ease of measurement, more accurate data, and the ability to accommodate existing traps. For color measurements, most commenters suggest that testing should be performed at the headend. We have already addressed these points in previous sections of this *Report and Order*. To recapitulate, the tests to be performed at the subscriber terminal are: the variation in visual signal level, the aural signal level, amplitude characteristic, C/N, coherent disturbances, terminal isolation (if necessary), and hum modulations. The tests for the visual carrier level are to be performed both at the subscriber terminal and at the end of a 100-foot cable drop that is connected to the subscriber tap. The tests for the color signals are to be performed at the output of modulation or processing equipment (generally the headend). The tests for aural center frequency are to be performed at both the subscriber terminal and the output of modulation or processing equipment. Finally, the tests performed for signal leakage must be run throughout the entire cable distribution system.[24]

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[23] *See* 47 C.F.R. §73.686(c)(1).

[24] We will specify all measurements in equivalent metric units in accordance with U.S. governmental policy. *See* 15 C.F.R. §205b. In addition, in order to reduce monitoring burdens on cable operators by minimizing unnecessary regulation, *see* 47 U.S.C. §521(6), we are merging our annual measurement requirements for signal leakage with our aeronautical frequency quarterly monitoring requirements, 47 C.F.R. §76.614, where applicable. This approach is supported by the Joint Agreement and by commenters in general. Some suggest that we require strict compliance with these standards, while Square D Company seeks clarification of our rules, particularly those regarding cable system terminal devices. We perceive no need to amend any of our signal leakage requirements. The change in terminol-

59. For measurements to be performed at the subscriber terminal, the cable operator may make measurements at any convenient monitoring point(s) in the cable network, provided that data shall be included to relate the measured performance of the system as would be viewed from a nearby subscriber terminal. Additionally, for system operators using traps or similar devices on specific channels, the tests for those channels may be made before the trap. However, a statement detailing the effects of these devices on the trapped channel and, if necessary, on the adjacent channels, must be attached to each of the cable operator's proof-of-performance records. For other scrambling systems, we expect the measurements to be performed at the output of the descrambler.

Specialized Cable Design

60. Cable system design is continually developing to provide additional services more efficiently to cable subscribers. These developments include cable architecture experiments, such as the implementation of Personal Communications Services [PCS] using existing or modified cable plant. Recognizing these continuing changes, we proposed in our *Notice* to continue to allow cable systems using specialized techniques or having an experimental design that cannot meet one or more of our standards to obtain permission to operate with such techniques or design, provided that the system operator makes an adequate showing, in accordance with §76.605(b) of the Rules, that the public interest would be served by such operation. The Joint Agreement concurs with this approach, as do most commenters, although it is criticized by NAB. Several commenters also express their concern that cable operators might use this provision to circumvent our standards.

61. We continue to believe that it is important to encourage technological innovation and experimentation within the cable industry. We also believe that our treatment of cable systems that employ experimental or specialized design features, which we have followed for some time, properly balances our public interest responsibilities. We stress that exemptions to any of our technical standards on this ground will not automatically be granted. Rather, any party seeking an authorization pursuant to this exception must demonstrate that an exemption will serve the public interest and that an acceptable signal will still be delivered to the cable subscriber. In response to the concern raised by NJBRC that the franchising authority be involved in any such determination, we note that our existing procedural rules provide local franchising authorities and other interested parties with a full opportunity to participate.[25]

Closed Captioning

62. Although our *Notice* contained no specific proposal addressing the question of technical standards for carriage of closed captioning data, both EIA/CEG and the National Captioning Institute, Inc. [NCI] raise this issue, recommending that we prohibit the removal or alteration of closed captioning data, and require the modification of existing cable systems employing equipment that does impair closed captioning data. The Joint Agreement includes a proposed rule prohibiting cable operators from removing or altering closed captioning data. In the *Order Granting Extension of Time, supra*, we requested, *inter alia*, comments on this and on other aspects of the Joint Agreement for which specific rules were not proposed in our *Notice*, and asked whether these matters were properly within the scope of this proceeding. Pursuant to this request, EIA/CEG and NCI replied that closed captioning standards should be adopted, and, citing *ACT v. FCC*, 564 F.2d 458 (D.C. Cir. 1977), EIA/CEG further urged that consideration of this issue is properly within the scope of the present proceeding. EIA/CEG and NCI, however, recommend a slightly different rule from the one proposed by the Joint Agreement. The latter simply prohibits the removal or alteration of line 21 closed captioning by cable operators. NCI's proposal goes beyond this and would require cable operators to ensure that line 21 closed captioning data is passed through intact to subscriber terminals in all cases. EIA/CEG's proposal is similar.

63. We believe that the issue of technical standards for closed captioning data is within the scope of the present proceeding. We stated in our *Notice* that "new technical problems have arisen that our standards do not yet address." *Id.* at 3673. We proposed "to reexamine and update our rules for all classes of cable channels," *id.*, and we sought comments not only on our specific proposals, but also on "any alternatives commenters may wish to suggest," *id.* at 3675. Both EIA/CEG and NCI offered specific comments and proposals for standards for closed captioning data, as did the Joint Agreement, and we specifically sought further comments on this issue in the *Order Granting Extension of Time, supra*. Accordingly, we believe that we have "fairly apprise[d] interested persons of the subjects and issues the agency was considering," and that "the Commission was considering a complete revamping of the...rules and comments on any of their aspects were welcome. "*American Transfer and Storage Co. v. ICC*, 719 F.2d 1283 (5th Cir. 1983). *See also ACT v. FCC*, 564 F.2d at 470.

64. We believe that the transmission and preservation of closed captioning data serves an important public interest and that cable systems should work with other interested parties to ensure that such data is neither degraded nor removed from a system's channels. In this regard, we note that Congress intended to guarantee delivery of closed captioning data while allowing cable systems to use exist-

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ogy and conversion to equivalent metric units merely updates the language of that rule. These changes will be adopted as proposed. Additionally, we have never relaxed our enforcement of cable signal leakage requirements. The clarifications sought by Square D were addressed in the *Memorandum Opinion and Order in Gen. Docket No. 85-301*, 3 FCC Rcd 6491, and need not be revisited here.

[25] *See, e.g., Viacom Cablevision of Wisconsin, Inc., supra.*

ing security techniques.[26] The Commission has adopted rules, effective July 1, 1993, requiring all television broadcast receivers manufactured in or imported into the United States to be able to decode closed captioning information. *Report and Order in Docket 91-1*, 6 FCC Rcd 2419 (1990). Those rules provide that the caption decoding circuitry "must function properly when receiving signals from any cable security system that was designed and marketed prior to April 5, 1991." 47 C.F.R. §15.119(l).

65. To ensure the future compatibility between television sets manufactured in compliance with the Television Decoder Circuitry Act of 1990 and cable system transmission of closed captioning data, we will adopt two requirements: 1) as of the effective date of the rules adopted herein, cable systems will be prohibited from deliberately removing the closed captioning delivered to subscribers where the equipment used and its configuration permits; and 2) effective July 1, 1993, cable systems shall deliver intact the closed captioning data contained on line 21 of the vertical blanking interval in a format that can be recovered and displayed by decoders manufactured in compliance with the Television Decoder Circuitry Act and §15.119 of our Rules. We believe these requirements will provide television set manufacturers and the designers of cable equipment with both the necessary transition time and a framework in which to coordinate their individual, but related, responsibilities.

Other Matters Raised by Parties

66. The Joint Agreement proposes standards addressing direct pickup |DPU| interference and FM radio signal levels. We stated in our *Notice* that DPU interference problems were beyond the scope of this proceeding and were more appropriately addressed in the context of Part 15 of our rules. *Id.* at 3675 n.9.[27] We also stated our belief that standards directly related to audio quality do not appear to be warranted at this time. We have not received many complaints from consumers or local franchising authorities about sound quality. Moreover, the cable industry generally recognizes that the provision of high quality cable audio services can lead to additional revenues for their systems. Indeed, highly popular music video services, such as MTV, provide a strong incentive for cable operators to deliver a satisfactory level of sound quality on their systems. *Id.* at 3676. Consequently, in view of these marketplace factors, we continue to believe that no specific technical standards concerning audio quality alone appear necessary at this time. This conclusion is supported by SMCTC and by the City of Sunnyvale and parties to the Joint Agreement do not dispute it. However, we note that we have imposed standards for those audio factors that do affect the quality of the video signal.[28] 67. Both SMCTC and the City of Sunnyvale also propose that we establish a visual depth of modulation standard. No other commenter supported or responded to this suggestion. We believe that the collective set of technical standards adopted today will ensure that a good quality picture is being delivered to the subscriber without any need for a visual depth of modulation standard as suggested. Therefore, we will not adopt standards in this area. With regard to DPU interference, we note that parties to the Joint Agreement concur with our conclusion that this is a problem more closely associated with subscriber premises equipment. *Notice*, 6 FCC Rcd at 3675 n. 9. Accordingly, we shall not adopt a DPU interference standard at this time. However, we shall revisit this area should it become necessary.

68. Finally, parties to the Joint Agreement propose that we adopt a rule recognizing the establishment of a Joint Engineering Committee, composed of representatives appointed by the parties to the Joint Agreement, to develop testing practices, review Commission technical standards, study technical standards parameters and issues, and make recommendations to the Commission. This proposal is opposed by EIA/CEG, which questions the need for formal federal recognition of a committee established by private entities and notes the lack of "justification for letting cable companies and cities designate the entire membership of a committee to explore issues relating to receiver performance...." We agree with EIA/CEG. We expect all interested parties to perform the proposed functions as a matter of course, and we note that we are always open to constructive suggestions on how to improve our technical standards. Formal recognition by the Commission of the proposed committee is therefore neither necessary nor warranted.

Effective Dates

69. Our *Notice* proposed no specific effective dates for our new rules on technical standards. Balancing the perceived need for cable systems to perform certain upgrades to come into compliance with the new rules and the need to provide cable subscribers with the benefits of the new rules as soon as possible, the Joint Agreement proposes an effective date of six months following adoption of the rules in most instances. In general, we concur with this proposal. However, as discussed in previous sections, we have recognized the need to allow longer periods of time for cable systems to come into compliance with certain of our new standards. We accordingly, recapitulate the implementation schedule of our technical standards for cable systems as follows: 1) aural carrier levels, aural center

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[26] *See* House Report on the Television Decoder Circuitry Act of 1990 (Pub. L. 101-431), H. R. Rep. No. 767, 101st Cong., 2d Sess. 15 (1990):

> The Committee also intends that the Commission will establish technical requirements that provide both for closed captioning and allowing cable systems to continue to use existing security techniques such as scrambling channels on the cable system, in order to guard against unauthorized reception of cable programming. It is the Committee's further intent that scrambling technologies utilized by the cable industry and other industries not interfere with viewers' ability to receive closed captioned programming.

See also the American With Disabilities Act, Pub. L. 101-336, 104 Stat. 327, *reprinted in* [1990] U.S. Code Cong. & Ad. News 267.

[27] Cable converters, including those owned by the cable operator, and other subscriber-owned equipment are subject to Part 15 requirements. *See* 47 C.F.R. §76.5 (v) Note. However, measurements taken at subscriber terminals for compliance with Part 15 of the Rules may be made at the output of converters owned by the cable operator.

[28] For factors that do affect signal quality, *see* paragraphs 15-16, *supra*.

frequency, the visual signal level standard, 24-hour tests, amplitude characteristic, coherent distortions, terminal isolation and hum modulations levels must be met six months from the effective date of this order (*see* paragraph 85, *infra*), with the required proof-of-performance to be conducted within thirty days thereafter; 2) a C/N level of 40 dB must be met one year from the effective date of this order; 3) color signal standards and a C/N level of 43 dB must be met 3 years from the effective date of this order; and 4) the closed captioning requirement of delivering line 21 data intact to subscriber terminals must be met by July 1, 1993.

V. FEDERAL-LOCAL RELATIONSHIPS

Federal Preemption

70. We addressed in our *Cable Report* and in our *Notice* our continuing concern about the undesirable consequences that a proliferation of different technical standards would have on the costs and quality of cable service available to subscribers and on the potential for technical innovation and improvements in the future. We accordingly proposed in general to continue our policy of preempting local standards which differ from ours. Some of the commenting parties, including MCRC, NFLCP, and the Village of Woodridge, argue that we should allow franchising authorities to impose technical standards stricter than ours. Most commenters that address this issue, in general or with respect to specific rules, support the proposal contained in our *Notice*. The Joint Agreement argues forcefully, as do a number of other parties, that the standards generally must be evaluated and enforced as a package so that the desired balance among the various standards is maintained.

71. Although in certain limited situations, discussed below, some deviation from our new technical standards may be justified on a cost basis, we continue to believe it would be highly undesirable in terms of the costs and quality of service the public receives to allow the development of numerous disparate and potentially conflicting standards at the local level. Our long standing policy of preempting technical standards other than our own has proven to be effective in ensuring that interstate communications, technical innovation, and service to the public are not hindered by conflicting regulations set at the local level by the more than 30,000 communities that receive cable service.[29] Therefore, we shall generally preclude local standards different from those established herein, whether more strict or more lenient.

72. This action is entirely consistent with the specific requirements of the Cable Act, prior judicial decisions in this proceeding, and general preemption law. The Cable Act provides that the "Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise." 47 U.S.C. §544(e). The actions taken in this proceeding flow directly from the responsibilities granted the Commission under this provision. In an earlier phase of this proceeding, the United States Court of Appeals for the District of Columbia Circuit specifically found that the Commission had authority under the Cable Act to adopt standards applicable to cable channels and to preclude state and local authorities from adopting more restrictive standards. *See City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987). The Supreme Court affirmed, noting that it doubted that "Congress intended to overturn the Commission's decade-old policy without discussion or even any suggestion that it was doing so." *City of New York v. FCC*, 486 U.S. at 68. More generally, the Supreme Court, in its decision in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), has upheld the Commission's authority in the cable television field to adopt regulations having preemptive effect, noting that federal regulations have no less preemptive effect than federal statutes and that preemption takes place when regulations are intended to preempt state law and the regulations themselves represent a reasonable accommodation of conflicting policies that were committed to the agency's care by statute. The actions taken herein fully comply with these requirements.

73. There are specific areas relating to the distribution of non-video communications where we conclude that federal standards should not -- indeed could not -- be imposed at this time without unduly interfering with the developmental process. *See* paragraph 16, *supra*. Commenters generally support this position and neither the Joint Agreement nor any other commenter has proposed any specific standards for such communications. Given the wide variety of services offered, or likely to be offered, on these channels, it would be extremely difficult to develop uniform and readily administered standards at this time. In addition, the development of either standardized requirements or a multiplicity of different requirements could stifle continuing innovation and experimentation in this field. For example, the Commission has sought to facilitate the deployment of new, experimental services by cable systems like PCS, the development of which could be hampered by unnecessary or inappropriate technical regulation. Thus, while we are not prepared at this time to preempt in these areas, we strongly urge state and local regulatory authorities not to establish their own standards. Moreover, we remain prepared to revisit this issue and to adopt exclusive federal regulations as necessary to achieve the objectives of the Communications Act.

Systems Serving Fewer than 1000 Subscribers

74. In our *Notice* we proposed to exempt systems with fewer than 1000 subscribers from federal technical standards. This proposal was based on our concern that we not impose unnecessary burdens on systems whose resources are limited by their small subscriber base. This concern is similar to one addressed in our *Report and Order in Docket 19659*, 47 FCC 2d 769 (1973), in which the impact of our performance test requirements on smaller cable television systems was evaluated. Accordingly, we proposed to allow franchising authorities to set

[29] As discussed below, for cost reasons, more lenient standards may be enforced with respect to certain smaller or lower density rural systems. Although a large number of systems fall within these categories, they serve only a fraction of the nation's cable subscribers. *See* note 30, *infra*. Accordingly, as a practical matter, we believe alternative forms of regulation in these areas are unlikely to have any significant adverse effect on the production of equipment for a nationwide market or with the distribution of interstate communications.

technical standards for such systems, up to the level of our standards, but not to regulate them directly at the federal level.

75. The Joint Agreement addresses this issue by proposing that we exempt smaller cable systems from testing requirements, but not from the underlying substantive federal standards. Other commenters, including the Navy Broadcasting Service, oppose our proposal.[30] Based on our review of the record, we are persuaded that the proposal set forth in the Joint Agreement strikes an appropriate balance in this area. Specifically, we agree that, in the absence of local intervention, small cable systems should be subject to our federal technical standards but exempted from our testing requirements. There is little question that certain of the equipment necessary to measure compliance with these standards is expensive.[31] Moreover, although formal testing is often needed for the regulatory process to function, much less expensive informal subjective viewing tests may well be adequate in more limited subscriber situations where informal resolution of complaints will necessarily be the norm. Consequently, we will not impose any formal testing requirements on cable systems serving fewer than 1000 subscribers. However, we believe that all subscribers are entitled to receive a quality signal. Therefore, operators of cable systems shall be expected to deliver a signal consistent with our rules. Local franchising authorities may test for compliance with the rules, and the Commission may conduct tests in connection with our enforcement efforts. Should such systems be found not to be in compliance, the Commission generally will not take enforcement action before giving such cable operators a reasonable time to take remedial action.

76. At the same time, we are aware that, given their limited subscriber base, small cable systems could find it more effective to curtail service rather than to incur the costs of complying with our standards, should those standards be unilaterally applied. Accordingly, we will depart from the Joint Agreement in one key respect: we will allow such systems' local franchising authorities to adopt less stringent standards than those we adopt today.[32] Local authorities are in the best position to evaluate the costs of compliance with technical standards and the impact that such costs will have on the provision of cable service. Should a franchising authority choose not to adopt less stringent standards, however, our federal technical standards will apply.

Systems Serving Rural Areas

77. A cable television system serves one or more communities or discrete areas, each of which is subject to the jurisdiction of a separate franchising authority. Some of these discrete areas may be rural in nature and have low population densities. In our *Notice*, we expressed our concern that, given the costs involved, these "rural" cable systems may not be able to meet certain of our standards immediately, if at all. We suggested that in four of the most costly areas of compliance -- visual signal level, signal level to noise ratio (C/N), ratio of visual signal level to coherent disturbances, and hum modulations -- cable operators serving rural communities should be able to negotiate with local franchising authorities to establish standards less stringent than those otherwise required, but not below an FCC-prescribed minimum. We sought comments on this proposed approach and on how to define rural systems.

78. A number of commenters, including NYSCCT, support our approach with reference to the C/N ratio. Archer S. Taylor supports it with reference to hum modulation and suggests that color signal standards also be included. Star Cable Associates [SCA] and InterMedia urge an outright preemption of standards for rural systems -- which SCA defines as those having fewer than 20 homes per mile and which InterMedia defines as those having fewer than 40 homes per mile -- with the FCC setting specific federal standards. The Navy Broadcasting Service cautions against creating too extensive a category of rural systems which can negotiate lesser standards, and AUI opposes our proposal outright. The Joint Agreement does not address this question.

79. Based on the record before us, we remain convinced that our proposed approach is both sound and appropriate, and we will expand its scope to include our standards for color signals. As discussed above, because of their small economic base, cable systems serving fewer than 1000 subscribers will be exempt from all of our technical standards should a local franchising authority determine that such standards should not be applied. We believe that rural cable systems which serve low population density areas should also be afforded some flexibility in meeting our technical standards. These rural cable systems usually serve several communities or discrete areas and, while their economic base typically is greater than that of systems serving fewer than 1000 subscribers, particularly high marginal costs may dissuade them from extending service to additional low population areas if they must comply fully with all of our technical standards.

80. Accordingly, to promote cable television service in these rural areas and in recognition of the franchising authority's unique position to balance service concerns with local marketplace conditions, we believe that local franchising authorities representing low population density areas should be allowed to set lesser technical standards for the five criteria noted above. In the absence of such local determinations, our federal technical standards will apply. Moreover, in order to provide subscribers with the maximum possible protection and because of the lesser costs involved, we will continue to require compliance with all other technical standards set forth in our rules.

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[30] In response to the concerns expressed by the Navy Broadcasting Service and other commenters, we stress that we do not intend for this policy to apply to community units serving fewer than 1000 subscribers that are part of a larger technically integrated multi-community system. Only approximately 3.6% of all cable subscribers in the United States are being served by cable systems whose total subscribership is fewer than 1000. *See Television and Cable Factbook*, Cable & Services Volume, no. 59 (1991), p. C-389.

[31] Archer S. Taylor, for example, notes that the cost of the equipment package for measuring color standards could exceed $80,000. Although equipment can be shared among systems, even the costs of hiring consultants who have access to the equipment could be significant.

[32] These systems are not, however, exempt from complying with our closed captioning requirement. *See* paragraph 65, *supra*.

While noting SCA's and InterMedia's suggestion as to how we should define rural systems for purposes of these rules, we reiterate that our underlying concern is that our technical standards not become a barrier to the provision of cable service to rural communities, a concern which also underlies exemptions to our cable-telephone company cross-ownership rules.[33] We believe it appropriate, therefore, to adopt the definition underlying the rebuttable evidentiary presumption afforded waiver requests to those rules: *i.e.*, a density of less than thirty households per route mile of coaxial cable trunk and feeder line.[34] We believe, based upon our experience, that this properly balances our concerns and those raised by the Navy Broadcasting Service that we not adopt an overly broad definition.

Enforcement

81. Given the nature of our "deliberately structured dualism" in the regulation of cable television, *Cable Television Report and Order*, 36 FCC 2d at 207, particularly as reflected in the Cable Act, we recognize that both this Commission, as well as local franchising authorities, will and should have roles in enforcing the technical standards we adopt today. We continue to believe, as we stated in our *Notice*, that the local franchising authorities are the proper initial locus of any complaint about the quality of technical service provided by a cable operator. Local authorities are most familiar with the local system operation and plant, as well as any local factors which could affect the resolution of a problem. We note, that we have in the past referred complaints concerning service quality to local authorities for resolution, and this practice resulted in the disposition of the vast majority of such complaints. The Joint Agreement supports a similar approach, as do several other commenters, including MCRC and the City of Tallahassee.

82. Accordingly, we shall reinstitute our prior complaint process and involve ourselves directly in the resolution of complaints only in the face of systemic problems or abuse that cannot be resolved at the local level. In light of the fact that signal quality is a component of franchising authorities' renewal review, we would expect cable operators to have every incentive to work cooperatively with franchising authorities to resolve signal quality complaints without the need for Commission intervention. We continue to believe that our resources will be best spent addressing intractable systemic reception problems brought to our attention by local franchising authorities. Accordingly, we require cable system operators to implement a complaint resolution process with regard to the quality of the television signal delivered to system subscribers. The records maintained by the cable system as a part of that process should be retained for a period of at least one year, and will be available to this Commission and the franchising authority upon request. Further, we believe that subscribers should be advised at least once each calendar year of the system's means of handling technical service complaints and of the address of the responsible officer of the local franchising authority. We also note that we will not preempt the terms of any existing or future franchise agreement on this subject that may prescribe more specific procedures and record-keeping requirements for the resolution of complaints, and we of course retain the right to inspect cable systems or investigate complaints of poor technical service. With regard to cases where we are asked to intervene, we will give priority to cases referred to us by franchising authorities that, after exhaustion of local efforts, have been unable to resolve the complaints about technical service. The rules we adopt in this decision will reflect these procedures.

VI. CONCLUSION

83. In view of the foregoing, we find it to be in the public interest to adopt technical standards for cable television systems, as set forth below in Appendix C. These standards will enable both the Commission and local franchising authorities to meet their statutory responsibilities, and will ensure the provision of quality cable service to the public without unnecessarily burdening cable operators.

VII. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

84. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need for and purpose of this action.

This action is taken in response to the decision in *City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987), and pursuant to the *Report in MM Docket No. 89-600*, 5 FCC Rcd 4962 (1990). This *Report and Order* prescribes technical standards for cable television systems, to ensure that quality service is provided to subscribers, and to enable the Commission and franchising authorities to fulfill their responsibilities pursuant to the Cable Communications Policy Act of 1984.

Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and the changes made as a result.

A. *Issues raised.* No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment.* Because there were no comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments.* None.

Significant alternatives considered and rejected

The Commission considered all the alternatives presented in the *Notice* and considered all the comments directed to the various issues in the *Notice*. In those cases in which commenters proposed alternatives that were less burdensome on cable operators and which would not detract

[33] 47 C.F.R. §63.56.
[34] *Id.*

from the Commission's goal of ensuring the provision of quality service to subscribers, these alternatives were adopted.

Ordering Clauses

85. Accordingly, IT IS ORDERED that, pursuant to §§4(i), 303(r), and 624(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(r), and 544(e), Part 76 of the Commission's Rules, 47 C.F.R. Part 76 IS AMENDED as set forth in Appendix C, below, effective [90 days following publication in the Federal Register].

86. IT IS FURTHER ORDERED that MM Docket No. 85-38 and MM Docket No. 91-169 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Further Notice of Proposed Rule Making in MM Docket No. 85-38

Comments

1. City of Bloomington, Minnesota
2. Citizens' Advisory Cable Television Committee
3. City of Dallas, Texas
4. Fairfax County, Virginia
5. General Instrument Corporation
6. City of Glendale
7. City of Indianapolis and Marion County, Indiana
8. City of Lee's Summit, Missouri
9. City of Los Angeles Department of Telecommunications
10. City of Mesa, Arizona
11. City of Milwaukee, Wisconsin
12. Montgomery County, Maryland
13. National Cable Television Association
14. National League of Cities
15. City of New York, New York
16. O.D. Page, P.E.
17. City of San Marcos, California
18. City of Santa Ana, California
19. Sherburne/Wright County Cable Communications Commission
20. Society of Broadcast Engineers
21. South Washington County Cable Communications Commission
22. TeleCable Corporation
23. City of Tuscon, Arizona
24. Western Communications, Inc.

Reply Comments

1. Fairfax County, Virginia
2. General Instrument Corporation
3. City of Jacksonville, Florida Department of Public Works
4. City of Los Angeles Department of Telecommunications
5. Montgomery County, Maryland
6. National Cable Television Association
7. National League of Cities
8. City of New York, New York
9. TeleCable Corporation

APPENDIX B

Notice of Proposed Rule Making in MM Docket No. 91-169

Comments

1. Armstrong Utilities, Inc.
2. Association for Maximum Service Television, Inc.
3. Benchmark Communications, *et al.*
4. Isaac S. Blonder
5. Buckeye Cablevision, *et al.*
6. Cablebus Systems Corporation
7. City of Cincinnati, Ohio
8. Continental Cablevision, Inc.
9. District of Columbia Office of Cable Television
10. Eagle Comtronics, Inc.
11. Electronic Industries Association Consumer Electronics Group
12. State of Hawaii
13. InterMedia Partners, L.P.
14. Miami Valley Cable Council
15. Multnomah Cable Regulatory Commission
16. National Association of Broadcasters
17. National Cable Television Association, *et al.*
18. National Captioning Institute, Inc.
19. Navy Broadcasting Service
20. New Jersey Board of Regulatory Commissioners
21. New York State Commission on Cable Television
22. Regal Technologies Ltd.
23. City of Richmond, California
24. Sacramento Metropolitan Cable Television Commission
25. Square D Company
26. City of Sunnyvale, California
27. City of Tallahassee, Florida
28. Archer S. Taylor
29. TeleCable Corporation

30. Tele-Communications, Inc.
31. Village of Woodridge, Illinois

Reply Comments

1. Fairfax County, Virginia
2. General Instrument Corporation
3. Montgomery County, Maryland
4. National Cable Television Association, *et al.*
5. National Federation of Local Cable Programmers
6. Prime Cable
7. Rock Associates
8. Square D Company
9. Star Cable Associates
10. Tele-Communications, Inc.

Further Reply Comments

1. Adelphia Communications Corporation
2. Association for Maximum Service Television, Inc.
3. City of Beverly Hills, California
4. Columbus Community Cable Access, Inc.
5. Cooper Industries, Belden Division
6. City and County of Denver, Colorado
7. Electronic Industries Association Consumer Electronics Group
8. InterMedia Partners, L.P.
9. Metropolitan Area Communications Commission
10. City of Milwaukee, Wisconsin
11. Minnesota Association of Cable Television Administrators
12. Montgomery County, Maryland
13. Village of Mount Prospect, Illinois
14. National Captioning Institute, Inc.
15. City of Portland, Oregon
16. Rifkin & Associates, Inc.
17. City of San Clemente, California
18. City of San Juan Capistrano, California
19. County of San Luis Obispo, California
20. County of Santa Cruz, California
21. Square D Company
22. Tele-Communications, Inc.
23. United Video Cablevision, Inc.

APPENDIX C

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. Section 76.5 is amended by adding paragraph (jj) to read as follows:

§ 76.5 Definitions.

* * * * *

(jj) Rural Area. A community unit with a density of less than thirty households per route mile of coaxial and or fiber optic cable trunk and feeder line.

* * * * *

2. Section 76.305 is amended by revising paragraphs (a) and (c) to read as follows:

§ 76.305 Records to be maintained locally by cable system operators for public inspection.

(a) Records to be maintained. The operator of every cable television system having 1,000 or more subscribers shall maintain for public inspection a file containing a copy of all records which are required to be kept by § 76.205(d) (origination cablecasts by candidates for public office); § 76.221(f) (sponsorship identifications); § 76.79 (EEO records available for public inspection); § 76.601(c) (proof-of-performance test data); and § 76.601(e) (signal leakage logs and repair records).

* * * * *

(c) The records specified in paragraph (a) of this section shall be retained for the period specified in §§ 76.205(d), 76.221(f), 76.79, 76.601(c), and 76.601(e), respectively.

* * * * *

3. Section 76.601 is amended by revising paragraphs (a) and (b), adding paragraphs (c), (d) and (e), and by deleting the concluding note. It is to read as follows:

§ 76.601 Performance tests.

(a) The operator of each cable television system shall be responsible for insuring that each such system is designed, installed, and operated in a manner that fully complies with the provisions of this subpart. Each system operator shall be prepared to show, on request by an authorized representative of the Commission or the local franchiser, that the system does, in fact, comply with the rules.

(b) The operator of each cable television system shall maintain at its local office a current listing of the cable television channels which that system delivers to its subscribers.

(c) The operator of each cable television system shall conduct complete performance tests of that system at least twice each calendar year (at intervals not to exceed seven months), unless otherwise noted below, and shall maintain the resulting test data on file at the operator's local business office for at least five (5) years. The test data shall be made available for inspection by the Commission or the local franchiser, upon request. The performance tests shall be directed at determining the extent to which the system complies with all the technical standards set forth in § 76.605(a) and shall be as follows:

(1) For cable television systems with 1,000 or more subscribers but with 12,500 subscribers or less, proof-of-performance tests conducted pursuant to this section shall include measurements taken at six (6) widely separated points within each mechanically continuous set of cables within the cable television system. Within the cable system, one additional test point shall be added for every additional 12,500 subscribers or fraction thereof (*e.g.*, 7 test points if 12,501 to 25,000 subscribers; 8 test points if 25,001 to 37,500 subscribers, *etc.*). Such proof-of-performance test points shall be balanced to represent all geographic areas served by the cable system. Within each mechanically continuous set of cables, at least one-third of the test points shall be representative of subscriber terminals most distant from the system input in terms of cable length. The measurements may be taken at convenient monitoring points in the cable network: Provided, that data shall be included to relate the measured performance of the system as would be viewed from a nearby subscriber terminal. An identification of the instruments, including the makes, model numbers, and the most recent date of calibration, a description of the procedures utilized, and a statement of qualifications of the person performing the tests shall be set forth.

(2) Proof-of-performance tests to determine the extent to which a cable television system complies with the standards set forth in § 76.605(a)(3), (4), and (5) shall be made on each of the NTSC or similar video channels of that system. Proof-of-performance tests for all other standards in § 76.605(a) shall be made on a minimum of four (4) channels plus one additional channel for every 100 MHz, or fraction thereof, of cable distribution system upper frequency limit (*e.g.*, 5 channels for cable television systems with a cable distribution system upper frequency limit of 101 to 216 MHz; 6 channels for cable television systems with a cable distribution system upper frequency limit of 217-300 MHz; 7 channels for cable television systems with a cable distribution upper frequency limit of 300 to 400 MHz, *etc.*). The channels selected for testing must be representative of all the channels within the cable television system.

(3) The operator of each cable television system shall conduct semi-annual proof-of-performance tests of that system, to determine the extent to which the system complies with the technical standards set forth in § 76.605(a)(4) as follows. The visual signal level on each channel shall be measured and recorded, along with the date and time of the measurement, once every six hours (at intervals of not less than five hours or no more than seven hours after the previous measurement), to include the warmest and the coldest times, during a 24-hour period in January or February and in July or August.

(4) The operator of each cable television system shall conduct triennial proof-of-performance tests of that system to determine the extent to which the system complies with the technical standards set forth in § 76.605(a) (11), (12), and (13).

(d) Successful completion of the performance tests required by paragraph (c) of this section does not relieve the system of the obligation to comply with all pertinent technical standards at all subscriber terminals. Additional tests, repeat tests, or tests involving specified subscriber terminals may be required by the Commission or the local franchiser to secure compliance with the technical standards.

(e) The provisions of paragraphs (c) and (d) of this section shall not apply to any cable television system having fewer than 1,000 subscribers: Provided, however, that any cable television system using any frequency spectrum other than that allocated to over-the-air television and FM broadcasting (as described in § 73.603 and § 73.210) is required to conduct all tests, measurements and monitoring of signal leakage that are required by this subpart. A cable television system operator complying with the monitoring, logging and the leakage repair requirements of § 76.614, shall be considered to have met the requirements of this paragraph. However, the leakage log, shall be retained for five years rather than the two years prescribed in § 76.614.

* * * * *

4. Section 76.605 is amended by revising paragraphs (a) and (b), by revising Note (1), by renaming Note (2) as Note (3) and by adding a new Note (2). It is to read as follows.

§ 76.605 Technical Standards.

(a) As of [6 months and 90 days following publication in the Federal Register], unless otherwise noted, the following requirements apply to the performance of a cable television system as measured at any subscriber terminal with a matched impedance at the termination point or at the output of the modulating or processing equipment (generally the headend) of the cable television system or otherwise as noted. The requirements are applicable to each NTSC or similar video downstream cable television channel in the system:

(1) The cable television channels delivered to the subscriber's terminal shall be capable of being received and displayed by TV broadcast receivers used for the off-the-air reception of TV broadcast signals, as authorized under Part 73 of this chapter.

(2) The aural center frequency of the aural carrier must be 4.5 MHz ± 5 kHz above the frequency of the visual carrier at the output of the modulating or processing equipment of a cable television system, and at the subscriber terminal.

(3) The visual signal level, across a terminating impedance which correctly matches the internal impedance of the cable system as viewed from the subscriber terminal, shall not be less than 1 millivolt across an internal impedance of 75 ohms (0 dBmV). Additionally, as measured at

the end of a 100 foot cable drop that is connected to the subscriber tap, it shall not be less than 1.41 millivolts across an internal impedance of 75 ohms (+3 dBmV). (At other impedance values, the minimum visual signal level, as viewed from the subscriber terminal, shall be the square root of 0.0133(Z) millivolts and, as measured at the end of a 100 foot cable drop that is connected to the subscriber tap, shall be 2 times the square root of 0.00662(Z) millivolts, where Z is the appropriate impedance value.)

(4) The visual signal level on each channel shall not vary more than 8 decibels within any six-month interval which must include four tests performed in six-hour increments during a 24-hour period in July or August and a 24-hour period in January or February, and shall be maintained within:

(i) 3 decibels (dB) of the visual signal level of any visual carrier within a 6 MHz nominal frequency separation;

(ii) 10 dB of the visual signal level on any other channel on a cable television system of up to 300 MHz of cable distribution system upper frequency limit, with a 1 dB increase for each additional 100 MHz of cable distribution system upper frequency limit (*e.g.*, 11 dB for a system at 301-400 MHz; 12 dB for a system at 401-500 MHz, *etc.*); and

(iii) A maximum level such that signal degradation due to overload in the subscriber's receiver or terminal does not occur.

(5) The rms voltage of the aural signal shall be maintained between 10 and 17 decibels below the associated visual signal level, and shall be maintained at levels not to cause interference to the upper adjacent channel. This requirement must be met both at the subscriber terminal and at the output of the modulating and processing equipment (generally the headend).

(6) The amplitude characteristic shall be within a range of ± 2 decibels from 0.75 MHz to 5.0 MHz above the lower boundary frequency of the cable television channel, referenced to the average of the highest and lowest amplitudes within these frequency boundaries.

(7) The ratio of RF visual signal level to system noise shall be as follows:

(i) From [90 days following publication in the Federal Register to 1 year thereafter], shall not be less than 36 decibels.

(ii) From [1 year and 90 days following publication in the Federal Register to 2 years thereafter], shall not be less than 40 decibels.

(iii) As of [3 years and 90 days following publication in the Federal Register], shall not be less than 43 decibels.

(iv) For class I cable television channels, the requirements of paragraphs (a)(7)(i), (a)(7)(ii) and (a)(7)(iii) of this section are applicable only to:

(A) Each signal which is delivered by a cable television system to subscribers within the predicted Grade B contour for that signal;

(B) Each signal which is first picked up within its predicted Grade B contour;

(C) Each signal that is first received by the cable television system by direct video feed from a TV broadcast station, a low power TV station, or a TV translator station.

(8) The ratio of visual signal level to the rms amplitude of any coherent disturbances such as intermodulation products, second and third order distortions or discrete-frequency interfering signals not operating on proper offset assignments shall be as follows:

(i) The ratio of visual signal level to coherent disturbances shall not be less than 51 decibels for noncoherent channel cable television systems, when measured with modulated carriers and time averaged; and

(ii) The ratio of visual signal level to coherent disturbances which are frequency-coincident with the visual carrier shall not be less than 47 decibels for coherent channel cable systems, when measured with modulated carriers and time averaged.

(9) The terminal isolation provided to each subscriber terminal:

(i) Shall not be less than 18 decibels. In lieu of periodic testing, the cable operator may use specifications provided by the manufacturer for the terminal isolation equipment to meet this standard; and

(ii) Shall be sufficient to prevent reflections caused by open-circuited or short-circuited subscriber terminals from producing visible picture impairments at any other subscriber terminal.

(10) The peak-to-peak variation in visual signal level caused by undesired low frequency disturbances (hum or repetitive transients) generated within the system, or by inadequate low frequency response, shall not exceed 3 percent of the visual signal level.

As of [3 years and 90 days following publication in the Federal Register], the following requirements apply to the performance of the cable television system as measured at the output of the modulating or processing equipment (generally the headend) of the system:

(11) The chrominance-luminance delay inequality or chroma delay, which is the change in delay time of the chrominance component of the signal relative to the luminance component after passing through the system, shall be within 170 nanoseconds.

(12) The differential gain for the color subcarrier of the television signal, which is measured as the difference in amplitude between the largest and smallest segments of the chrominance signal (divided by the largest and expressed in percent), shall not exceed ± 20%.

(13) The differential phase for the color subcarrier of the television signal which is measured as the largest phase difference in degrees between each segment of the chrominance signal and reference segment (the segment at the blanking level of 0 IRE), shall not exceed ± 10 degrees.

(14) As an exception to the general provision requiring measurements to be made at subscriber terminals, and without regard to the type of signals carried by the cable television system, signal leakage from a cable television system shall be measured in accordance with the procedures outlined in § 76.609(h) and shall be limited as follows:

Frequencies	Signal Leakage Limit (microvolts/meter)	Distance in meters (m)
Less than and including 54 MHz, and over 216 MHz	15	30
Over 54 up to and including 216 MHz	20	3

(h) Cable television systems distributing signals by using methods such as nonconventional coaxial cable techniques, noncoaxial copper cable techniques, specialized coaxial cable and fiber optical cable hybridization techniques or specialized compression techniques or specialized receiving devices, and which, because of their basic design, cannot comply with one or more of the technical standards set forth in paragraph (a) of this section, may be permitted to operate: Provided, that an adequate showing is made pursuant to § 76.7 which establishes that the public interest is benefited. In such instances, the Commission may prescribe special technical requirements to ensure that subscribers to such systems are provided with an equivalent level of good quality service.

Note 1: Local franchising authorities of systems serving fewer than 1000 subscribers may adopt standards less stringent than those in § 76.605(a). Any such agreement shall be reduced to writing and be associated with the system's proof-of-performance records.

Note 2: For systems serving rural areas as defined in § 76.5, the system's local franchising authority may adopt standards less stringent than those in §§ 76.605(a)(3), 76.605(a)(7), 76.605(a)(8), 76.605(a)(10), 76.605(a)(11), 76.605(a)(12), and 76.605(a)(13). Any such agreement shall be reduced to writing and be associated with the system's proof-of-performance records.

* * * * *

5. Section 76.606 is to be added to read as follows:

§ 76.606 Closed Captioning.

(a) The requirements for closed captioning are as follows:

(i) As of [90 days following publication in the Federal Register], the operator of each cable television system shall not take any action to remove or alter closed captioning data contained on line 21 of the vertical blanking interval; and

(ii) As of July 1, 1993, the operator of each cable television system shall deliver intact closed captioning data contained on line 21 of the vertical blanking interval, as it arrives at the headend or from another origination source, to subscriber terminals and (when so delivered to the cable system) in a format that can be recovered and displayed by decoders meeting § 15.119 of the Rules.

* * * * *

6. Section 76.607 is to be added to read as follows:

§ 76.607 Resolution of Complaints.

Cable system operators shall establish a process for resolving complaints from subscribers about the quality of the television signal delivered. These records shall be maintained for at least a one-year period and be available for inspection by the Commission and franchising authority, upon request. Subscribers shall be advised, at least once each calendar year, of the procedures for resolution of complaints by the cable system operator, including the address of the responsible officer of the local franchising authority.

NOTE: Prior to being referred to the Commission, complaints from subscribers about the quality of the television signal delivered must be referred to the local franchising authority and the cable system operator.

7. Section 76.609 is to be amended to revise paragraph (d)(2), the last sentence in paragraph (e), paragraph (g), the first sentence in paragraph (h), and paragraph (h)(2), to replace paragraph (i), and to add paragraph (j). It is to read as follows:

§ 76.609 Measurements.

* * * * *

(d)(2) By using either a multiburst generator or vertical interval test signals and either a modulator or processor at the sending end, and by using either a demodulator and either an oscilloscope display or a waveform monitor display at the subscriber terminal.

(e) * * * Alternatively, measurements made in accordance with the NCTA Recommended Practices for Measurements on Cable Television Systems, 2nd edition, November 1989, on noise measurement may be employed.

* * * * *

(g) The terminal isolation between any two terminals in the cable television system may be measured by applying a signal of known amplitude to one terminal and measuring the amplitude of that signal at the other terminal. The frequency of the signal should be close to the midfrequency of the channel being tested. Measurements of terminal isolation are not required when either (1) the manufacturer's specifications for subscriber tap isolation based on a representative sample of no less than 500 subscribers taps or (2) laboratory tests performed by or for the operator of a cable television system on a representative sample of no less than 50 subscriber taps, indicates that the terminal isolation standard of § 76.605(a)(9) is met. To demonstrate compliance with § 76.605(a)(9), the operator of a cable television system shall attach either such manufacturer's specifications or laboratory measurements as an exhibit to each proof-of-performance record.

(h) Measurements to determine the field strength of the signal leakage emanated by the cable television system shall be made in accordance with standard engineering procedures. * * *

* * * * *

(h)(2) Field strength shall be expressed in terms of the rms value of synchronizing peak for each cable television channel for which signal can be measured.

(i) For systems using cable traps and filters to control the delivery of specific channels to the subscriber terminal, measurements made to determine compliance with § 76.605(a)(5) and (6) may be performed at the location immediately prior to the trap or filter for the specific channel. The effects of these traps or filters, as certified by the system engineer or the equipment manufacturer, must be attached to each proof-of-performance record.

(j) Measurements made to determine the differential gain, differential phase and the chrominance-luminance delay inequality (chroma delay) shall be made in accordance with the NCTA Recommended Practices for Measurements on Cable Television Systems, 2nd edition, November 1989, on these parameters.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-26

In the Matter of

Amendment of Rules Governing
Procedures to Be Followed When
Formal Complaints Are Filed Against
Common Carriers.

NOTICE OF PROPOSED RULEMAKING

Adopted: February 13, 1992; Released: March 12, 1992

Comment Date: April 21, 1992
Reply Comment Date: May 11, 1992

By the Commission: Commissioner Barrett issuing a separate statement.

INTRODUCTION

1. This Notice of Proposed Rulemaking solicits comments on proposed changes to our rules regarding the procedures applied to formal complaints against common carriers.[1] Our goal in initiating this proceeding is to facilitate timelier resolution of formal complaints by eliminating procedures and pleading requirements that have caused unintended and unnecessary delays. This Commission is committed to the expeditious resolution of formal complaints. Unfortunately, our current procedures, particularly those pertaining to discovery, have often operated to prolong rather than expedite resolution. Given this Commission's reliance on the complaint process to resolve many pricing and other disputes between customers and common carriers, we must seek new ways to expedite disposition of formal complaints. Therefore, we propose the following changes to our rules -- changes designed to ensure just, fair and timely resolutions of formal complaints. Generally, we propose to modify filing deadlines, eliminate certain pleading opportunities which do not appear useful or necessary, and modify and consolidate the discovery process. Although rule changes cannot address all factors affecting speed of resolution for all cases (*e.g.*, staffing and other resource limitations, case complexity, other litigation related issues), the revisions we propose herein are intended to reduce delay by encouraging more concise and thorough pleadings and by minimizing the protracted disputes over discovery issues that have, in some cases, overtaken proceedings.

BACKGROUND

2. Section 208 of the Communications Act permits any party to file a complaint against a common carrier for acts or omissions in violation of either the Communications Act or a Commission rule or order. 47 U.S.C. §208. Formal complaint proceedings are similar to litigation conducted in a court but are generally decided solely on the basis of written pleadings and evidence rather than through trial-type procedures. Our rules specifying pleading requirements and procedures applied in formal complaint cases were last revised nearly four years ago. *Amendment of Rules Governing Procedures to Be Followed Where Formal Complaints Are Filed Against Common Carriers, Report and Order*, 3 FCC Rcd 1806 (1988) (*1988 Formal Complaints Rules Revision*). That major revision set explicit requirements with respect to the content of pleadings, incorporated informal practices regarding briefs and settlement conferences into the rules, and introduced discovery.

3. Under our rules as presently framed, formal complaints are served by the Commission on the defendant, who must either satisfy the complaint or file an answer within 30 days. A reply to the answer may be filed by the complainant within ten days from the date the answer is served. Although this pleading is voluntary under the current rules, a complainant's failure to reply to affirmative defenses presented in an answer is deemed to be an admission of any facts alleged. Throughout the formal complaint process, the parties may file motions requesting Commission orders addressing a wide variety of procedural and substantive matters. The only restriction with respect to the timing of motions regards requests that the allegations in a complaint be made more definite and certain; such motions must be filed within 15 days after service of a complaint by the Commission. Oppositions to motions may be filed within ten days from the date of service and replies to oppositions are due within five days after the time for filing oppositions has expired.

4. Currently, both the complainant and defendant in formal complaint actions may engage in discovery. Each party has an opportunity to address up to 30 single interrogatories seeking nonprivileged information relevant to the proceeding from the opposing party. Such interrogatories may be served during the time period beginning with service of the complaint and ending 30 days after the date a reply is due to be filed. Answers or objections to interrogatories are due 30 days after service of the interrogatories, except for a defendant who may respond within either the specified 30 day period or 15 days after its answer to the complaint is filed, whichever date is later. If a party receiving interrogatories fails to respond or has objected, the party propounding the interrogatories has 15 days from the date objections were served or responses were due to move to compel a response. Other forms of discovery, such as the production of documents and the taking of depositions, as well as additional interrogatories beyond the limit of 30, are available only if so ordered by the Commission. Parties may file motions seeking such discovery orders. Oppositions to such motions are due in the normal 10 day time frame applied to all motions. However, replies to oppositions to discovery motions are not permitted.

[1] These rules are found at 47 C.F.R. §§ 1.720-1.734.

5. At any time, the Commission may require parties to file additional briefs addressing legal issues and summarizing the pleadings and other record evidence. In addition, the Commission calls status conferences to narrow the issues, obtain stipulations of fact, assess the sufficiency of the record, plan discovery, pursue settlement, or conduct other discussions for the purpose of promoting progress in the case.[2]

DISCUSSION

6. The Commission's stated goals in adopting the current procedural rules were "to promote the creation of a better and more complete record for the disposition of formal complaints, to improve the speed of resolving such complaints, and to clarify and simplify the present rules." *1988 Formal Complaints Rules Revisions*, 3 FCC Rcd at 1806. After almost four years of experience with addressing formal complaints under the current rules, however, we believe that certain modifications are needed to facilitate timelier resolution of these complaints. In some instances, the current rules permit parties to file unnecessary pleadings and needlessly prolong the discovery process, thereby frustrating prompt disposition of complaints. Moreover, in 1988, after the current rules were adopted, Congress amended Section 208 to require that those complaints challenging the lawfulness of "a charge, classification, regulation or practice" are to be resolved within 12 months of filing, 15 months if the case involves facts of "extraordinary complexity." 47 U.S.C. § 208(b); Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (Nov. 3, 1988). The Commission works very hard to comply with this statutory mandate. The unnecessary delays which frequently occur under the present rules become even more troublesome in light of the time constraints imposed by the statutory amendments.

7. Therefore, after examining procedures, rule requirements and case histories, it appears to us that the formal complaint process can be expedited and simplified by modifying filing deadlines, eliminating apparently unnecessary pleading opportunities, and modifying and consolidating the discovery process. The specific provisions proposed herein would revise our rules accordingly. We believe that these proposed rule changes will result in a net benefit to the public, the parties, and the Commission. By achieving a full and sufficient record more promptly and by eliminating the incentive for parties to file redundant pleadings or engage in protracted discovery, the Commission should be able to resolve formal complaints in a more timely manner. We invite interested persons to comment on our proposals and to identify any other revisions that might assist in achieving our goal of timely resolution of formal complaints. The full text of the proposed rules is set forth in the attached Appendix.

Pleadings

8. We propose to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days from date of service. We note that the new proposed deadline for an answer to a complaint coincides with that required under the federal rules governing litigation in court. Federal Rules of Civil Procedure, Rule 12(a).[3]

9. We also propose to introduce time limits for filing briefs when such additional submissions are required by the Commission to supplement or consolidate the record. The current rule authorizing the Commission to require the filing of briefs does not establish any time frame for their submission. In cases where the Commission or its staff orders the submission of briefs but does not permit discovery, we propose to require that briefs be filed concurrently by the complainant and defendant within 15 days from the date the staff orders submission of such a pleading, unless otherwise stated.[4] Such briefs would be limited to no more than 25 pages. In cases where discovery has been conducted, we propose to set the filing deadline for both defendant and complainant at 20 days from the date the staff orders submission of such a pleading, unless otherwise stated. We propose that reply briefs be permitted only in such cases where discovery has been conducted. These reply briefs, again to be filed concurrently by both parties, would be due within ten days from the filing deadline for initial briefs. We propose that in cases where discovery has been conducted, initial briefs be limited to 35 pages and reply briefs to 20 pages, unless otherwise specified by the staff. These provisions should assure uniformity and consistency with respect to briefs filed in formal complaints cases.

10. Another significant change with respect to the pleadings filed in formal complaint cases involves the proposed revision of Section 1.726, which currently permits a complainant to reply to a defendant's answer to a complaint. Under the present rule, filing a reply is voluntary and failure to reply is not deemed to be an admission of any allegation contained in the answer, except with respect to any facts included in affirmative defenses contained in the answer. We have found that in most cases, replies do not significantly aid the Commission in resolving factual or legal issues in the formal complaint context and often simply repeat arguments made in the original complaint. In other instances, replies have been used to offer information or explanations that should have been presented initially in the complaint. Therefore, we propose to eliminate replies except in those cases where an answer to a complaint presents affirmative defenses that are factually different from any denials also

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[2] Further, the Commission has decided to develop a pilot project to explore the potential of alternative dispute resolution (ADR) techniques in the Section 208 formal complaint context. The Commission has stated that it will encourage the parties at settlement conferences to consider the use of ADR procedures to resolve formal complaints. *Initial Policy Statement and Order*, 6 FCC Rcd 5669, 5670 (1991).

[3] Although we do not find it necessary, or even preferable, to model our formal complaint rules precisely upon federal rules of civil procedure, the federal rules may provide useful guidance in certain instances.

[4] We propose that the staff be permitted, during status conferences, to order orally that briefs be submitted. Any such orders would be promptly memorialized in writing and served on the parties.

contained in the answer.[5] Limiting a complainant's opportunity to file a reply to such a particular circumstance should expedite resolution of complaints without threatening either the development of a complete record or a complainant's ability to plead a case. If replies are not allowed, the complainant will have an increased impetus to produce a complaint that reflects the nature and facts of a controversy completely and accurately and avoids unnecessary delay in responding to the complaint. Although our current rules require the inclusion of specific facts and legal authorities upon which a complaint is based, we have observed that complaints often do not contain the level of factual support or legal analysis we consider to be appropriate in establishing a record for resolution.[6] In fact, it appears that in some instances, complainants are filing marginally acceptable complaints to initiate a proceeding, apparently counting on establishing the basic factual underpinnings of their case through subsequent pleadings or discovery. Such practices unnecessarily complicate and prolong the formal complaints process. Terminating the right of a complainant to file a reply would operate to encourage full compliance with our rules regarding the level of detail that should be offered in support of a complaint. Factual or legal controversies that require elucidation beyond that contained in the complaint and answer can be addressed by the parties through discovery or in briefs as called for by the Commission.

11. We are also proposing new restrictions applicable to the submission of motions to specify that no motions are to be filed until the time an answer is due, except when a complainant moves for dismissal. Presently, motions to make a complaint more definite and certain are to be filed within 15 days after service of a complaint. Other motions can be filed any time during the pendency of a case at the discretion of the movant. We now propose to require that motions to make a complaint more definite and certain be filed with the answer which must, notwithstanding the motion, respond to those allegations that can reasonably be addressed. Similarly, a defendant's motion seeking dismissal or summary judgment must be filed with the answer, unless it is based upon information discovered after the deadline for filing the answer and clearly so states, identifying the particular information and the occasion of its discovery. As is currently allowed, oppositions to motions could be filed within ten days after the motion is filed. We propose to state more explicitly that oppositions to motions may address only those issues raised by the motion. Thus, when a motion is incorporated in an answer, the opposition to the motion cannot address issues presented in the answer that are not also specifically raised in the motion. Finally, consistent with our proposal to no longer permit the filing of replies to answers in formal complaint proceedings, we are also proposing that replies to oppositions to motions similarly be disallowed in the formal complaint arena. The proposed restrictions regarding motions should ensure that relevant information is immediately presented to the Commission while also curbing the proliferation of motions and their responsive pleadings that either address a variety of procedural issues of minimal significance or repeat substantive allegations contained in major pleadings.[7]

12. Finally, we propose to add a rule explaining that, pursuant to Section 1.1105(1)(c), fees must be paid by parties filing formal complaints. This new rule would expressly state that when a complaint is against multiple defendants, separate fees must be paid for each named defendant. This rule should assist parties who may not be aware of fee requirements already adopted by this Commission, under statutory mandate,[8] since the last revision of the formal complaint rules.

Discovery

13. We propose to change the discovery mechanisms encompassed by our rules in several significant respects. Although we believe that the benefits of limited self-executing discovery through interrogatories, with other forms of discovery permissible only with Commission approval, are substantial and should be preserved, we propose to change somewhat the scope, procedures and timing associated with these discovery tools in an effort to minimize unnecessary delay caused by protracted discovery.[9] To limit delay often associated with the scope and magnitude of discovery, we propose that, unless otherwise directed by the staff, no discovery regarding alleged damages be permitted until after an initial finding of liability by the Commission, thus bifurcating the proceeding. We seek comment on this proposal, particularly whether substantial benefits would be realized by such a bifurcated approach. Our experience handling formal complaints has shown that a significant amount of the parties' discovery

[5] In addition, if the answer contains a cross-complaint, the complainant may file an answer in accordance with the rules regarding such pleadings.

[6] As a related matter, we propose to add a provision applicable to all pleadings in formal complaint cases requiring that any statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

[7] The proliferation of redundant motions should also be affected by elimination of replies, as outlined above. The frequency of motions that essentially repeat allegations made in other pleadings in a case should be diminished, since such filings would permit the opposing party an opportunity to respond that would not have been available absent the motion. For instance, under our proposed structure eliminating replies, the complainant would not respond to the defendant's answer. However, if the defendant filed a motion seeking dismissal or summary judgment simply repeating the allegations and defenses contained in its answer, the complainant would have the right to respond in an opposition to the defendant's motion. Presumably, parties would want to avoid providing opposing counsel an extra opportunity to promote their case and, accordingly, forego filing repetitive motions that offer no bases for resolution of the complaint other than those already fully presented in other pleadings.

[8] 47 U.S.C. § 158; Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, 101 Stat. 2106 (1989).

[9] We have also found that discovery is not always necessary to compile an adequate record for resolution of all formal complaint cases, particularly at the liability phase of the proceeding. We seek comment on whether a rule precluding discovery, including interrogatories, absent an affirmative order by the staff would serve to expedite the complaint process without adversely affecting the parties. We encourage commenters to submit alternative expediting proposals regarding the timing of discovery that would facilitate the prompt resolution of formal complaints.

efforts often center around developing facts that would prove or disprove injury or damages incurred as a consequence of a violation of the Communications Act or Commission requirements. The time and effort expended by the parties and the staff on such discovery is effectively wasted if no violation or liability is found.[10] Nevertheless, we are aware that requiring the parties to litigate damage claims in a bifurcated proceeding could result in the expenditure of considerable additional time and resources of the parties and the staff. One possible way to minimize this burden would be to establish, following a finding of liability, a limited period during which the parties could engage in settlement negotiations or submit their damage claims to voluntary alternative dispute resolution mechanisms prior to further proceedings on damages, including any referral to an Administrative Law Judge. We ask interested parties to comment on the benefits, if any, that would be realized by implementation of this approach as a separate phase of the proceeding. We also encourage commenters to submit alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

14. We also propose to change the discovery timetable in other respects. Parties may now initiate discovery during the time period beginning with service of the complaint and ending 30 days after the date a reply is due to be filed. We propose to shorten the time available to initiate discovery so that no requests for discovery, including self-executing interrogatories, would be served either before an answer is due, or more than 20 days after such date, unless otherwise directed by the staff. This should ensure more focused, effective discovery requests by the parties. Likewise, any requests for production of documents or other discovery initiatives would have to be pursued within this same time frame. Answers to interrogatories and requested documents would be due within 20 days of service, rather than the current 30 days. Any objection to the breadth of discovery would have to be made within 10 days of service rather than within the 30 days currently allowed for all objections to discovery. Objections based on attorney/client or other similar, legally recognized privileges could be raised at the time answers are due as is currently the case. We propose to cut the number of days available to file motions to compel answers and/or production from 15 to five. All objections to discovery would be resolved by the Commission staff at a status conference and promptly memorialized in writing and served on the parties. In the event an objection is overruled, answers to interrogatories or requested documents would be due within 10 days from the date of the status conference. These changes should provide for more prompt resolution of discovery while continuing to ensure the development of a complete record.

15. We also seek comment on whether issues regarding relevance should continue to be grounds for opposing an interrogatory or document request. One possible change to our current framework governing discovery could be to preclude objections to discovery based on relevance. Under such an approach, refusal to answer an interrogatory or an objection based on relevance would be deemed an admission of allegations contained in the interrogatory. However, such an admission would only be relevant for the purposes of resolving the complaint. In this manner, a respondent would likely have strong incentives to answer all arguably pertinent questions, yet presumably would not suffer for failing to answer a clearly irrelevant question. We ask commenters to address whether such an approach would facilitate the discovery process without adversely affecting the parties.

16. We also propose to add rules providing for the confidential treatment of proprietary information provided in formal complaint proceedings. In the discovery process, the question of confidentiality of discovered proprietary information often gives rise to significant delays as parties attempt to reach confidentiality agreements. Therefore, we propose a rule to mitigate such delays. The Commission explicitly declined to take such action when the formal complaints rules were last modified. *1988 Formal Complaints Rules Revisions*, 3 FCC Rcd 1806, 1811. At that time, the Commission noted that parties concerned about protecting proprietary information filed with the Commission could request, pursuant to Section 0.459 of the rules,[11] that such materials be held in confidence. In addition, the Commission observed that parties may negotiate protective agreements between themselves or move for the imposition of a protective order applicable to any materials to be exchanged. Having observed and participated in the process by which such private protective arrangements are produced and implemented, we have concluded that formal complaints proceedings might be expedited by introducing a rule limiting the disclosure of sensitive materials to and by the parties.[12] We have modeled the proposed provisions on protective agreements entered in past cases. Accordingly, we propose to incorporate in our rules provisions specifying the manner in which proprietary materials produced to an opposing party may be used, duplicated and disseminated.[13] These protections would be applied to all materials that a party believes in good faith to fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552.[14] We seek comment on

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[10] We have, in the past, sought to expedite resolution of the basic issue of liability and, accordingly, exercised our discretion to bifurcate formal complaint proceedings, holding in abeyance issues involving damages until liability has been established. We would, in any event, retain discretion to conduct such bifurcated proceedings. In particular, while not done routinely, the Commission retains the authority to designate appropriate cases for evidentiary hearing before Administrative Law Judges after liability has been decided.

[11] 47 C.F.R. § 0.459.

[12] In some instances, completion of discovery has been delayed by a year or more while parties resolved concerns regarding the treatment of proprietary material to be produced through discovery.

[13] Specifically, we are proposing that: proprietary materials could only be viewed by certain individuals employed by the recipient; duplication would be restricted and the recipient would be required to maintain a log recording all the production and distribution of all copies made; upon termination of the complaint proceeding all copies of the proprietary materials and related logs would be provided to the producing party; and any notes or work product based on proprietary material would be destroyed.

[14] We recognize that there are certain to be disputes as to whether particular materials merit protection. We expect parties to be reasonable in claiming proprietary status, but are prepared to intervene and deliver rulings in status conferences regarding the designation of specific records or categories of records.

this proposal and encourage commenters to submit alternative expediting proposals regarding the issue of confidentiality in the discovery process.

17. We also propose to modify our rules so that answers to interrogatories and documents produced through discovery are not routinely filed with the Commission. Such action in many instances would eliminate the need to seek a confidentiality ruling under Section 0.459, since that provision applies only to materials held by the Commission. Discovered information that is deemed by the parties to be of decisional significance could be included in briefs submitted to the Commission. Confidential treatment by the Commission could then be sought for what would certainly be a more limited amount of data. We are proposing that parties be required to file two versions of briefs - a version available for public inspection which has been edited to remove all information claimed to be confidential, and a complete confidential version filed under seal. We seek comment on this proposal, and request commenters to address other ways the Commission might efficiently administer the filing of briefs containing confidential information.

18. The proposed expedited discovery schedule and consolidated framework should significantly improve the processing for formal complaints without imposing new major burdens on the parties or the Commission staff. We believe the changes are necessary to reduce any incentive to use the discovery process as a delaying tactic or procedural ploy. Discovery delays should be significantly diminished by our proposals to incorporate confidentiality provisions into the formal complaints rules, to provide for verbal staff rulings at status conferences, and to bifurcate discovery so that damages are not addressed until after liability has been established. We believe the proposed rules strike an appropriate balance between the sometimes competing interests in promoting the progress of complaint actions before the Commission, protecting the interests of the parties, and ensuring that an adequate record is compiled for Commission resolution.

19. In both the *Report and Order* adopting the 1988 formal complaints rule revisions and the initiating *Notice of Proposed Rulemaking*, the Commission recognized that the discovery process is, by nature, susceptible to delaying tactics and procedural manipulation. Accordingly, the Commission indicated that formal complaint discovery would be monitored to limit such abuses. *1988 Formal Complaints Rules Revision*, 3 FCC Rcd 1806, 1809; *Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 2 FCC Rcd 90 (1987). Almost four years of experience with the current discovery structure has convinced us that it should be refined to emphasize incentives for compliance and expedition. We believe the modifications we are proposing work to that end and increase the likelihood that discovery will be an effective tool to develop a factual record for resolution rather than the procedural morass it has increasingly become.

PROCEDURAL MATTERS

Ex Parte Rules - Non-restricted Proceeding

20. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

21. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Although the proposed rules change the timing and mechanics of the formal complaints process, they would not alter the level of evidentiary and legal support required of parties to such actions. In fact, the proposed rules would eliminate certain pleading opportunities now permitted. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

CONCLUSION

22. In this *Notice*, we have outlined our proposals for modifying our rules pertaining to formal complaints against common carriers. We have proposed, for example, to cut the times allowed for the filing of certain pleadings, restrict the time period during which motions may be filed, and tighten discovery provisions by prohibiting discovery regarding damages until after liability has been established. We request comments on the issues and proposals addressed in this *Notice* and the attached Appendix, and encourage full participation of parties to formal complaints actions and their legal representatives.

23. Accordingly, pursuant to Sections 1, 4(i), 201(b), 208 and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 201(b), 208 and 403, a NOTICE OF PROPOSED RULEMAKING IS ISSUED, proposing amendment of 47 C.F.R. § 1.720 *et seq.* as set forth in the Appendix.

24. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, all interested parties may file comments on the matters discussed in this Notice and on the proposed rules contained in the Appendix by **April 21, 1992.** Reply comments are due by **May 11, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Refer-

ence Room (Room 203) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PROPOSED RULE CHANGES

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. In § 1.720, paragraph (i) is added to read as follows:

§ 1.720 General pleading requirements.

* * * * *

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

3. In § 1.724, paragraph (a) is revised to read as follows:

§ 1.724 Answers.

(a) Any carrier upon which a copy of a formal complaint, supplemental complaint, amended complaint or cross complaint is served under this subpart shall answer within 20 days of service of the pleading to which the answer is made, unless otherwise directed by the Commission.

* * * * *

4. Section 1.726 is revised to read as follows:

§ 1.726 Replies.

Within 10 days after service of an answer containing affirmative defenses that are factually different from any denials also contained therein, a complainant may file and serve a reply which shall be responsive to only those allegations contained in affirmative defenses. Failure to reply will be deemed an admission of such allegations.

5. In § 1.727, paragraphs (b) and (e) are removed; paragraphs (c) and (d) are redesignated and republished as paragraphs (e) and (f), respectively; and new paragraphs (b), (c), (d) and (g) are added to read as follows:

§ 1.727 Motions.

* * * * *

(b) Motions shall not be filed before submission of an answer except when a complainant, either by itself or jointly with a defendant, moves for dismissal.

(c) A motion by a defendant that allegations in a complaint be made more definite and certain may be filed with the answer to the complaint which must, nonetheless, respond to those allegations that reasonably can be addressed.

(d) A motion by a defendant for summary judgment or dismissal may be filed with the answer to the complaint. No such motions will be accepted after the deadline for filing an answer unless the motion is based upon information discovered after the pleading deadline and clearly so states, identifying the particular information and the occasion of its discovery.

(e) Where the matter involved in the motion is one of procedure or discovery, the moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(f) A party opposing any motion concerning procedure or discovery shall also provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(g) Oppositions to motions may be filed within ten days after the motion is filed. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, an opposition to the motion shall not address any issues presented in the answer that are not also specifically raised in the motion.

6. In § 1.729, paragraph (a) is revised to read as follows; paragraphs (b), (c), and (d) are revised to read as follows and redesignated as paragraphs (d), (e), and (g), respectively; and new paragraphs (b), (c), and (f) are added to read as follows:

§ 1.729 Interrogatories to parties.

(a) During the time period beginning with the date an answer to a complaint is due and ending 20 days after such date, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. Parties shall propound no more than 30 single interrogatories without prior Commission approval. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. All interrogatories served on an opposing party shall be filed with the Commission at the time of service.

(b) Unless otherwise directed by the staff, no discovery pertaining to damages will be authorized until the Commission or its staff has issued a decision on the merits of a complaint or cross-complaint in favor of the complainant.

(c) Any objection to the breadth of an interrogatory shall be made within 10 days after service of the interrogatory. Other objections based on legally recognized grounds (e.g. attorney-client) may be submitted in lieu of an answer.

(d) Parties on whom interrogatories are served shall respond without waiting to be ordered to do so by the Commission. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for

objection shall be submitted in accordance with subsection (c), above. The answers shall be signed by the person making them. The party on whom the interrogatories were served shall serve a copy of the answers and objections, if any, within 20 days after service of the interrogatories. Failure to answer or an evasive answer will be deemed an admission for purposes of resolving the complaint.

(e) Where the responding party has failed to respond, or has objected, to any interrogatory, the party propounding the interrogatories may, within 5 days of the date the response was due if no response is filed or the date of service of the objection, move to compel a response thereto.

(f) Objections will be resolved by Commission staff at a status conference. Such rulings will be promptly memorialized in writing and served on the parties. In the event an objection is overruled by the Commission staff, the respondent shall serve the requested materials on the movant within 10 days from the date of the status conference or within 20 days after service of the interrogatories, whichever period is longer.

(g) Answers to interrogatories shall not be filed with the Commission unless so ordered by the Commission or its staff.

7. In § 1.730, paragraph (c) is revised to read as follows and paragraph (d) ia added to read as follows:

§ 1.730 Other forms of discovery.

* * * * *

(c) Motions seeking discovery beyond the 30 single interrogatories permitted under § 1.729 may be filed during the period beginning with the date an answer to a complaint is due and ending 20 days after such date, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period. (d) Documents produced through discovery shall not be filed with the Commission unless so ordered by the Commission or its staff.

8. Sections 1.731 through 1.734 are redesignated as §§ 1.732 through 1.735.

9. New § 1.731 is added to read as follows:

§ 1.730 Confidentiality of information produced through discovery.

(a) Any materials generated or provided by a party in response to discovery may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552(b)(1) - (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed.

(b) Materials marked as proprietary may be disclosed solely to the following parties and only to the extent necessary to assist in the prosecution or defense of the complaint action:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff;

(5) Court reporters and stenographers in accordance with the terms and conditions of this section; and

(6) Persons employed by the party or third party that generated the material designated as proprietary.

These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information.

(c) No copies of materials marked proprietary may be made except working copies to be used by persons designated in subsection (b), above. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(d) Upon final termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log of persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

10. In newly redesignated § 1.732, paragraph (b) is redesignated and republished as paragraph (f); and new paragraphs (b), (c), (d), and (e) are added to read as follows:

§ 1.732 Other required written submissions.

* * * * *

(b) In cases where discovery is not conducted, briefs shall be filed concurrently by both complainant and defendant within 15 days from the date the Commission or its staff orders submission of such a pleading. Briefs shall be no longer than 25 pages, unless otherwise ordered.

(c) In cases where discovery is conducted, initial briefs shall be filed concurrently by both complainant and defendant within 20 days from the date the Commission or its staff orders submission of such a pleading. Initial briefs shall be no longer than 35 pages, unless otherwise ordered. (d) Reply briefs may be filed only in cases where discovery is conducted. Reply briefs may be submitted by either party within 10 days from the filing deadline for initial briefs. Reply briefs shall be no longer than 20 pages, unless otherwise ordered.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 1.731 shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 and clearly marked "Not for Public Inspection." An edited version removing all references to proprietary data shall also be filed with the Commission for inclusion in the public file.

(f) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

11. In newly redesignated § 1.733, paragraph (a) introductory text is republished; paragraphs (a)(5) and (b) are revised to read as follows; paragraphs (c) and (d) are

redesignated and republished as paragraphs (d) and (e), respectively; and new paragraph (c) is added to read as follows:

§ 1.733 Status conference.

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:

* * * * *

(5) The necessity and extent of discovery, including objections to interrogatories or requests for production of documents;

* * * * *

(b) While a conference normally will be scheduled after the answer has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) During a status conference the staff may issue rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, *inter alia,* procedural motions, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. However, all rulings are effective immediately upon issuance at the conference.

(d) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(e) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not prevent the Commission from conferring with those parties or counsel present.

12. In newly redesignated § 1.735, paragraph (b) is revised to read as follows:

§ 1.735 Copies; service; separate filings against multiple defendants.

* * * * *

(b) The complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with Subpart G of this Part of the Rules. See 47 C.F.R. § 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee and supply three additional copies of the complaint for each additional defendant.

* * * * *

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers

I support this Notice of Proposed Rulemaking that seeks comment on proposed modifications to the Commission's formal complaint rules. Our intent here is to make the process more efficient which should aid in earlier resolution of complaints. To this end, I will be interested in the problems faced by complainants and common carriers in complying with our existing rules. I am hopeful we can receive well thought out comments on how to make the process user friendly, efficient, and timely.

I understand the perceived burdens that our proposed rule modifications may place on complainants, but I believe that the potential time and energy savings for complainants, common carriers and the public ultimately may outweigh these burdens. In this regard, I believe our proposed rules will encourage those practicing before the Commission to file more thorough and concise statements. Finally, while I believe this Notice provides a valuable framework for discussion of ways to improve the formal complaint process, I will be interested in any comments regarding "genuine" harm to the rights of the customers in terms of the proposed rule modifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. — AAD 92-20

Expansion of Voting Membership on Voluntary Access Tariff Committees

ORDER

Adopted: March 11, 1992; Released: March 11, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 20, 1991, the National Exchange Carrier Association, Inc. (NECA) filed a petition for waiver of Section 69.602(e) of the Commission's Rules[1] to permit the expansion of voting membership on NECA's voluntary access tariff committees to directors from outside the telephone industry and directors from non-pooling exchange carriers (ECs). In order to enhance controls over NECA's management and processes, we grant NECA's request to the extent of allowing the two recently elected outside directors voting membership on the Common Line (CL) and Traffic Sensitive (TS) tariff committees, and all other NECA committees, for the January 1, 1992 through December 31, 1992 term.

II. BACKGROUND

2. Section 69.602(e) of the Commission's Rules limits membership on the CL and TS committees to directors whose exchange carriers participate in the respective pools.[2] Although directors from non-pooling exchange carriers traditionally have attended CL and TS tariff committee meetings, they have thus far been limited to observer status by the rule.

3. In a November 9, 1990 letter to NECA,[3] the Commission expressed concern with the apparent conduct of some members of NECA's Board of Directors and stated that it intended to consider expanding the NECA Board to include two or more members from outside the local exchange carrier industry. In response to the Commission's *November 9 Letter*, NECA filed a petition for waiver and a petition for rulemaking[4] proposing to expand the NECA Board to include two directors from outside the telephone industry. We granted NECA's waiver request and permitted NECA's members to elect two outside directors for the January 1 through December 31, 1992 term.[5] We also noted that additional measures may prove necessary to ensure that NECA discharges its obligations under our Rules.[6]

4. NECA filed the subject petition for waiver of Section 69.602(e) to expand voting membership on the voluntary access tariff committees to both the two outside directors and directors from non-pooling ECs. NECA indicates that an expansion of voting membership will enhance controls over directors' actions and provide a more balanced perspective. NECA also notes that its independent auditor, in its recommendations with respect to safeguards over the pooling process, suggested that voting membership on the CL and TS tariff committees be expanded to include outside directors and directors from non-pooling ECs.[7]

III. DISCUSSION

5. When the Commission created NECA in 1983, it recognized that the telephone companies choosing to enter voluntary common tariff arrangements share a common interest in the rate structure of the association's tariff. Accordingly, the Commission assigned responsibility for developing the charges for each of the access element groups to a committee whose membership is restricted to board members whose companies participate in each access group's pooling.[8] This rule assigned primary responsibility to board members directly affected by the work of the voluntary access tariff committees.

6. However, we now believe that extending voting privileges to outside directors will enhance the effectiveness of the voluntary access tariff committees -- as well as other NECA committees --*inter alia* by providing additional perspectives on access issues and pool requirements. Accordingly, we believe that the public interest would best be served by granting the outside directors voting membership on all NECA committees.

7. We delay considering, however, the merits of granting non-pooling exchange carriers voting rights on the CL and TS committees. The Commission will consider this recommendation in conjunction with NECA's Petition for Rulemaking regarding the composition of the NECA Board.[9] Accordingly, we grant NECA's waiver request to

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[1] 47 C.F.R. §69.602(e).
[2] *Id.*
[3] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990) (*November 9 Letter*).
[4] *See* NECA Petition for Waiver, AAD 91-28, filed May 28, 1991; NECA Petition for Rulemaking, RM 7736, filed May 24, 1991.
[5] *See* Expansion of the NECA Board to Include Two Directors from Outside the Telephone Industry, 6 FCC Rcd 5403 (1991).
[6] *Id.*, 6 FCC Rcd 5403 (1990).
[7] *See* Review and Recommended Safeguards, AAD 91-24, filed December 9, 1991, pp. 28-29.
[8] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Supplemental Order, 94 FCC 2d 852, 855 (1983).
[9] *See* NECA Request for Rule Change Concerning the Composition of its Board of Directors, filed May 24, 1991; Pleading Cycles Established for Comments on Petition for Rulemaking and Petition for Waiver Concerning Composition of NECA's Board, *Public Notice*, released June 7, 1991. In addition to considering NECA's request to permanently expand the NECA Board, the Commission will also consider NECA's independent auditor's recently submitted recommendations with respect to

the extent it seeks authority to extend voting membership to the two outside directors for the January 1, 1992 through December 31, 1992 term.

IV. ORDERING CLAUSE

8. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(a) and 0.291, IT IS ORDERED that the petition for waiver filed December 20, 1991, by the National Exchange Carrier Association, Inc, IS HEREBY GRANTED to the extent of authorizing the two outside directors voting membership on NECA's committees for the January 1, 1992 through December 31, 1992 term and IS OTHERWISE DENIED to the extent indicated in paragraph 7 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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safeguards to ensure the accuracy of data reported to NECA. *See* Review and Recommended Safeguards, AAD 91-24, filed December 9, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-313

In the matter of

Conformance of FCC Regulations
with International Standards
for ISM Equipment

ORDER EXTENDING TIME TO FILE COMMENTS

Adopted: March 11, 1992; Released: March 12, 1992

By the Chief Engineer:

1. A notice of inquiry (NOI) in the above entitled proceeding was adopted by the Commission on October 22, 1991 and released on November 6, 1991. Comments in this proceeding are due on March 13, 1992. Reply comments are due on April 13, 1992.

2. The National Electrical Manufacturers Association (NEMA) filed with the Commission, on March 4, 1992, a request for extension of the comment period. NEMA indicates that additional time is needed to allow several of its committees to meet and complete their comments.

3. Because of the many questions raised in the NOI and the need to have a comprehensive input from the manufacturers of ISM equipment, it has been determined that an extension of the comment and reply dates is appropriate. Accordingly, it is ordered, pursuant to the delegated authority contained in 47 CFR § 0.241(a), that the period of time for filing comments in the above proceeding is extended until **May 13, 1992,** and the period for filing reply comments is extended until **June 15, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Airwaves Company - Request for refund of filing fee for a new FM broadcast station at Magee, Mississippi - **Granted** (February 21, 1992).

Anzek, Louis M. - Request for reconsideration of determination re refund of a hearing fee for a new FM station at Lebanon, Tennessee - **Denied** (February 11, 1992).

Blanchard, Bruce David, Limited Partnership - Request for reconsideration to reinstate an application for a new FM station at Ocean City, Maryland - **Dismissed** (February 20, 1992).

Constine, William V. - Request for refund of a hearing fee for a new FM station at Ashley, Michigan - **Granted** (February 27, 1992).

Diaz, Carmen - Request for a refund of a hearing fee for a new FM station at Sun City, California - **Granted** (January 29, 1992).

Dox Radio Partnership - Request for a refund of a filing fee for an extension of time for construction permit in Wildwood, New Jersey - **Denied** (February 21, 1992).

Eagle of Iowa, Inc. - Request for refund of a hearing fee for a new FM station at Asbury, Iowa - **Granted** (February 26, 1992).

Embrescia, James T. - Request for refund of a hearing fee for a new FM station at Ashtabula, Ohio - **Granted** (February 27, 1992).

KMTR, Inc. - Request for refund of hearing fee for a new television station at Roseburg, Oregon - **Granted** (February 21, 1992).

LKR Communications, Inc. - Request for refund of a rulemaking fee re a petition to substitute channel 274C2 for Channel 272A at Van Buren, Arkansas - **Granted** (February 27, 1992).

Navajo Broadcasting Company - Request for refund of a filing fee for a petition for rulemaking to upgrade facilities at Holbrook, Arizona - **Granted** (February 27, 1992).

Owens, Edith H. - Request for reinstatement of an application for a new AM radio broadcast station at Petaluma, California - **Denied** (February 21, 1992).

Palm Beach Gardens Radio - Request for refund of a hearing fee for a new FM radio station at Palm Beach Gardens, Florida - **Granted** (February 20, 1992).

Sea Explorer Ship, 1, Boy Scouts of America - Request for exemption of filing fees for radio licenses - **Denied** (February 21, 1992).

Senior, John, Broadcasting - Request for refund of a hearing fee for a new FM station at Manahawkin, New Jersey - **Granted** (February 19, 1992).

Southern Air Communications, Inc. - Request for refund of rulemaking fee re petition for allocation of Channel 269C3 to Palmers Crossing, Mississippi - **Granted** (February 21, 1992).

Turtle Broadcasting Company of Branson, LP - Request for refund of a filing fee for a FM station in Branson, Missouri - **Denied** (January 30, 1992).

Walker, W. Keith - Request for a refund of a hearing fee for a new FM station at Parker, Arizona - **Granted** (January 29, 1992).

WSMK Enterprises - Request for a refund of a hearing fee for a new FM radio station on Channel 267A at Essex, New York - **Denied** (February 21, 1992).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

Anne Thomas Paxson, Esquire
Borsari & Paxson
2033 M Street, N.W.
Suite 630
Washington, D.C. 20036

Dear Ms. Paxson:

This is in response to your request for a refund of the fee that Airwaves Company (Airwaves), submitted with its application for a new FM broadcast station at Magee, Mississippi.

You state that, after Airwaves filed its application for Channel 230A at Magee, the Channel was reassigned to another community, and its application was dismissed. You, therefore, request a refund of Airwaves application fee because the Commission adopted a rule nullifying its application. 47 C.F.R. § 1.1111(a)(4).

Airwaves and Colon Johnston filed mutually exclusive proposals requesting allotment of Channel 230A to Pearl and Magee, Mississippi, respectively. The Mass Media Bureau dismissed Johnston's proposal for procedural flaws, and allotted Channel 230A to Magee. See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pearl and Magee), Mississippi, MM Docket No. 88-312, 4 FCC Rcd 1764 (1988). Airwaves filed an application to operate on the Channel at Magee and Johnston filed a petition for reconsideration of its proposal to assign the Channel to Pearl. On reconsideration, the Bureau reassigned Channel 230A from Magee to Pearl and allotted Channel 298C to Magee. See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pearl and Magee, Mississippi), MM Docket No. 88-312, 6 FCC 246 (1991). In its Order, the Bureau stated that Airwaves might be entitled to a refund pursuant to 47 C.F.R. 1.1111(a)(4) since its application for use of Channel 230A at Magee became moot due its reassignment. See 6 FCC Rcd at 247; see also letter to Anne Thomas Paxson from Dennis Williams, Chief, FM Branch, dated March 13, 1991.

Section 1.1111(a)(4) provides for a refund if the Commission adopts a rule which nullifies a pending application. In adopting section 1.1111(a)(4), the Commission explicitly stated that the rule did not apply in cases where FM or TV licensees or permittees apply for an upgraded channel. See Establishment of a Fee Collection Program, 2 FCC Rcd 947 (1987), reconsidered in

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
FEB 1 1 1992

OFFICE OF
MANAGING DIRECTOR

Mr. & Mrs. Louis M. Anzek
P.O. Box 678
Hendersonville, Tennessee 37077-0678

Dear Mr. & Mrs. Anzek:

This is in response to your request for reconsideration of the determination by the Associate Managing Director for Operations that you are not entitled to a refund of the hearing fee that you submitted in connection with your application for a new FM station at Lebanon, Tennessee.

You state that the Administrative Law Judge presiding over the comparative hearing designated to select the licensee at Lebanon dismissed your application pursuant to your request. You withdrew from the proceeding because you were financially unable to continue, and you also requested a refund of your hearing fee. The Associate Managing Director denied this request because you failed to assert grounds which would justify a refund under the Commission's rules concerning refunds. You did, however, receive a refund of a $200.00 overpayment that you had made with your hearing fee. See 47 C.F.R. § 1.1111.

You now ask for reconsideration of the Associate's decision contending that you are entitled to the requested refund in its entirety since "no action toward the hearing" occurred before you filed your refund request and because you have encountered severe financial difficulty.

Our review of this matter discloses no grounds upon which a refund may be justified. Once the Mass Media Bureau has issued its Hearing Designation Order, the Commission's rules permit the refund of a hearing fee only if a single application has survived the Notice of Appearance deadline, and that application is ready for grant. See 47 C.F.R. § 1.1111(c); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990). While I understand that your financial situation has changed since you filed your application, the Commission's rules do not provide for refunds of fee payments due to a change in an applicant's financial circumstances. Therefore, your request for reconsideration cannot be granted.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 20 1992

Ernest T. Sanchez, Esquire
Arter & Hadden
1801 K Street, N.W.
Suite 400
Washington, D.C. 20006

Dear Mr. Sanchez:

This is in response to your petition for reconsideration and for reinstatement, nunc pro tunc, of an application filed by Bruce David Blanchard, Limited Partnership (Blanchard), applicant for a new FM station at Ocean City, Maryland. Aris Mardirossian, a competing applicant for the station at Ocean City, has opposed your petition.

Our review of this matter discloses that Blanchard filed its hearing fee on July 16, 1991, one day following the Commission's deadline established for this filing. Subsequently, the Mass Media Bureau dismissed Blanchard's application for failure to make timely payment of the requisite hearing fee. See letter to Earnest T. Sanchez from Dennis Williams, Chief, FM Branch, dated August 28, 1991.

Under the Commission revised procedures for the payment of hearing fees, mutually exclusive applicants with applications accepted for filing by public notice released before July 1, 1991 were required to file their hearing fees by July 15, 1991. See Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 157 (1991), reconsidered in part, 6 FCC Rcd 3403, 3408. Since Blanchard filed its application and fee payment after the deadline for filing, the Bureau properly returned its application.

Accordingly, your request is dismissed.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 27 1992

Lauren A. Colby, Esquire
10 East Fourth Street
Post Office Box 113
Frederick, Maryland 21701

Dear Mr. Colby:

This is in response to your request for a refund of the hearing fee submitted by William V. Constine, successful applicant for a new FM station at Ashley, Michigan.

You state that, after Mr. Constine timely paid his hearing fee, the Mass Media Bureau dismissed the sole competing applicant for the station at Ashley and granted the license to Mr. Constine without the issuance of a designation order.

Section 1.1111(c)(1) of the Commission's rules provides for the return of a hearing fee whenever an application is granted without designation for hearing. 47 C.F.R. § 1.1111(c)(1).

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and made payable to William V. Constine, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Ms. Carmen Diaz
1749 Alviso Street
Simi Valley, California 93065

Dear Ms. Diaz:

This is in response to your request for a refund of the hearing fee that you filed with your application for a new FM station at Sun City, California.

Pursuant to the procedure adopted in Proposals to Reform the Commission's Hearing Process, 6 FCC Rcd 3403, 3409 (1991), you paid your hearing fee by July 15, 1991 and prior to the designation of your application for a comparative hearing. The Hearing Designation Order (HDO) was issued on August 6, but you did not file a Notice of Appearance and later informed the presiding Administrative Law Judge that you had decided not to participate in the proceeding.

Prior to the Commission's decision in Proposals to Reform the Commission's Hearing Process, applicants were required to submit their hearing fees with their Notices of Appearance, and applicants that elected to withdraw from a comparative case could do so without suffering the loss of their hearing fee. We do not believe that Proposals to Reform the Commission's Hearing Process was intended to modify an applicant's ability to decline to participate in comparative proceedings without the loss of their hearing fees. See letter to Howard M. Weiss, Esquire from Marilyn J. McDermett, Associate Managing Director, dated September 24, 1991.

Accordingly, your request is granted. A refund, in the amount of $6,760.00 and made payable to Carmen Diaz, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

David D. Oxenford, Esquire
Fisher, Wayland, Cooper
and Leader
1255 Twenty-Third Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Mr. Oxenford:

This is in response to your request for a refund of the fee filed by Dox Radio Partnership (Dox) with its application for an extension of time for its construction permit covering WDOX(FM), Wildwood, New Jersey.

You state that the day after Dox submitted its extension request, the Commission modified station WDOX(FM)'s construction permit and afforded Dox an additional six months to complete construction. You, therefore, request a refund of Dox's fee to cover the extension of time application since that request became moot before it could be processed.

Our review of this matter discloses no basis for grant of a refund. In establishing its fee program, the Commission declared that a refund would be afforded only in the limited instances set forth in Section 1.1111. See Fee Collection Program, 2 FCC Rcd 947, 949 (1987), reconsidered in part, 3 FCC Rcd 5987 (1989). Section 1.1111 contains no exception to the prohibition on refunds due to the grant of an underlying application rendering an application for an extension of time moot. Moreover, the Commission has explicitly rejected the issuance of a refund based on the disposition of the underlying application. See 2 FCC Rcd at 949.

Accordingly, your request for a refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEB 26 1992

OFFICE OF
MANAGING DIRECTOR

John E. Fiorini III, Esquire
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

Dear Mr. Fiorini:

This is in response to your request for a refund of the hearing fee submitted by Eagle of Iowa, Inc. (Eagle), former applicant for a new FM station at Asbury, Iowa.

You state that Eagle and its sole competitor for the new station at Asbury filed a settlement agreement with the presiding Administration Law Judge prior to the deadline for filing Notices of Appearance, and, that, therefore, Eagle is entitled to a refund of its hearing fee.

Section 1.1111(b)(4) of the Commission's rules provides for the refund of a hearing fee when a settlement agreement is filed with the presiding judge by the Notice of Appearance deadline. 47 C.F.R. § 1.1111(b)(4). Our review of this matter discloses that Eagle timely filed its settlement agreement for purposes of receiving a refund.

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and made payable to Eagle of Iowa, Inc., will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 27 1992

David D. Oxenford, Esquire
Fisher, Wayland, Cooper & Leader
1255 Twenty-Third Street, N.W.
Suite 800
Washington, D.C. 20037-6318

Dear Mr. Oxenford:

This is in response to your request for refund of the hearing fee submitted by James T. Embrescia, former applicant for a new FM station at Ashtabula, Ohio.

You state that Mr. Embrescia timely paid his hearing fee but withdrew from the proceeding prior to the time for filing Notices of Appearance.

Prior to the Commission's decision in Proposals to Reform the Commission's Hearing Process, 6 FCC Rcd 3403 (1991), applicants were required to submit their hearing fee with their Notice of Appearance, and applicants that elected to withdraw from a comparative case on or before that date could do so without suffering the loss of their hearing fee. We do not believe that Proposals to Reform the Commission's Hearing Process was intended to modify an applicant's ability to withdraw, on or before the Notice of Appearance deadline, without the loss of its hearing fee.

Accordingly, your request is granted. A refund, in the amount of $6,760.00, made payable to James T. Embrescia, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-4201.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

John P. Crigler, Esquire
Haley, Bader & Potts
Suite 600
2000 M Street, N.W.
Washington, D.C. 20036-3374

Dear Mr. Crigler:

This is in response to your request for refund of the hearing fee submitted by KMTR, Inc. (KMTR) in connection with its application for a new television station at Roseburg, Oregon.

You request return of KMTR's hearing fee because KMTR's application was granted without designation for hearing. You state that KMTR and another applicant filed competing applications for the station at Roseburg. KMTR then filed a petition for rulemaking requesting the Commission to allot an additional television channel at Roseburg which either KMTR or its competitor could specify by amendment to their applications. Following KMTR's submission of its hearing fee on July 15, 1991, consistent with the Commission's revised procedures covering the filing of hearing fees, the Mass Media Bureau allotted another channel to Roseburg and awarded KMTR cut-off protection. See Roseburg, Oregon, 6 FCC Rcd 4369 (1991). Subsequently, the Commission granted KMTR's application for a new television station without designation for hearing.

Section 1.1111(b)(1) of the Commission's rules provides refund of a hearing fee when an application is granted without being designated for hearing. Our review of this matter discloses that no designation order was issued to select the licensee at Roseburg. Accordingly, your request is granted.

A check, made payable to KMTR, Inc. and drawn in the amount of $6,760.00, will be forwarded to you at the earliest practicable time. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 27 1992

Frank R. Jazzo, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Dear Mr. Jazzo:

This is in response to your request for a refund of the rulemaking fee submitted by LKR Communications, Inc. (LKR) in connection with its petition to substitute Channel 274C2 for Channel 272A at Van Buren, Arkansas.

You state that a refund is due because LKR filed a rulemaking fee to cover its application to upgrade its station's facilities consistent with the Commission's action on its petition for rulemaking. However, no rulemaking fee was due since LKR's petition was filed before the fee requirement for rulemakings became effective.

We have determined that the rulemaking fee should apply in all cases in which a petition for rulemaking was filed after May, 21, 1990, the effective date of the Commission's implementation of the 1989 Budget Act, wherein Congress established the rulemaking fee. Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC Rcd 5919 (1991). As of that date, petitioners were clearly on notice that rulemaking requests either to upgrade a station's channel or change its community of license was subject to the fee requirement.

Accordingly, because LKR's petition for rulemaking was filed before the effective date of the Commission's implementation of the 1988 Budget Act, your request is granted. A check, drawn in the amount of $1,565.00 and made payable to LKR Communications, Inc., will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEB 27 1992

OFFICE OF
MANAGING DIRECTOR

John M. Pelkey, Esquire
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036-3374

Dear Mr. Pelkey:

This is in response to your request for refund of a fee submitted by Navajo Broadcasting Company in connection with its petition for rulemaking to upgrade its facilities at Holbrook, Arizona.

You request a refund of the rulemaking fee because the fee was prematurely filed.

The Commission has determined that a rulemaking fee is due following the conclusion of the rulemaking proceeding, upon the filing of an application for a change in a station's operations consistent with the disposition of the rulemaking. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3659-60 (1989). Since Navajo's petition for rulemaking is still pending, and Navajo has not filed any follow-up application, we find that the fee payment was prematurely made and that a refund is warranted. Accordingly, your request is granted.

A check, made payable to Navajo Broadcasting Company and drawn in the amount of $1,565.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

Ms. Edith H. Owens
502 D Avenida Sevilla
Laguna Hills, CA 92653

Dear Ms. Owens:

This is in response to your request for reinstatement of your application for a new AM radio broadcast station at Petaluma, California.

You state that your application was accepted for filing by the Commission (File No. BP-900815AC), and that your application was mutually exclusive with the renewal application for KTOB(AM), Petaluma, California (File No. BR-900817UG). You further state that your application was dismissed by letter of January 3, 1992, because you did not pay your hearing fee, due July 15, 1991, until August 15, 1991. You now request reinstatement of your application because you allege that the licensee of KTOB(AM) indicated that it would not pursue renewal of its license.

Your hearing fee was due July 15, 1991, as set forth in Public Notice, Mimeo No. 13110, released May 15, 1991. This notice states that a commercial applicant that has been accepted for filing in a public notice prior to July 1, 1991 must pay its hearing fee on July 15, 1991. Your application was accepted for filing by Public Notice, Mimeo No. 10622, released November 16, 1990. You paid your $6,760 hearing fee on August 15, 1991, one month after it was due (Fee Control No. 9108168170307001).

From the inception of the Fee Collection Program, the Commission has taken the position that it has the authority to dismiss any application or filing for late payment of any charge. Establishment of a Fee Collection Program, 2 FCC Rcd 947, 957 (1987) (Fees I), citing 47 U.S.C. § 8(c)(2). In Fees I, we specifically addressed the merits of imposing penalties for late payments, weighing the concerns of applicants that might be denied an opportunity to compete for the right to provide a communications service against the processing costs of a cash management system capable of maintaining an extensive billing and collection system. 2 FCC Rcd at 956.

Although you state that "payment of [your] hearing fee was delayed for several substantial reasons," the reasons you have provided

are irrelevant to your application. As your request for reinstatement primarily concerns the renewal of an AM station mutually exclusive with your application, we are unable to find any basis for reversing the decision to dismiss your application for untimely payment of the hearing fee. You simply have not addressed the issue of why your application should be reinstated when you tendered your hearing fee one month after it was due. As Section 8(c)(2) of the Communications Act authorizes the Commission to dismiss any application or filing for failure to pay any fee in a timely manner, your application was properly dismissed.

Accordingly, your request for reinstatment is denied. Because you did not pay your hearing fee in a timely manner as required by the relevant public notice, your fee will be refunded to you. See 47 C.F.R. § 1.1111(b). A check for $6,760, payable to Edith H. Owens, will be forwarded to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: James R. Burtle, Chief, AM Branch

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 20 1992

Leo Kesselman, Esq.
200 Glenridge Avenue
Los Gatos, California 95030

Dear Mr. Kesselman:

This is in response to your request for refund of hearing fee submitted on behalf of Palm Beach Gardens Radio (Palm Beach), the surviving applicant for a new FM radio station at Palm Beach Gardens, Florida.

You state that Palm Beach tendered its $6,760 hearing fee on July 12, 1991. You further state that Palm Beach and other competing applicants were mutually exclusive, but that the other applicants did not pay their hearing fees as required.

If only one applicant pays the required hearing fee, that single remaining applicant will be entitled to a refund of the hearing fee upon request if it is immediately grantable. See 47 C.F.R. §1.1111(c)(2). Palm Beach was the only applicant to pay the hearing fee by the required date. However, Palm Beach's application is not immediately grantable due to interference with Cuban stations. The interference problem must be resolved by international negotiation rather than by a Commission hearing, without requiring the utilization of Commission resources. Accordingly, under the unique circumstances of this case, and for good cause shown, Palm Beach's hearing fee will be refunded.

However, if, upon resolution of the international interference matter, it becomes necessary to designate the Palm Beach application for hearing, then Palm Beach will at that time be directed to resubmit a hearing fee or its application will be dismissed.

Accordingly, a check for $6,760, payable to Palm Beach Gardens Radio, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

CDR. John R. Erickson, USCG (Ret.)
Ship Committee Chairman
Explorer Ship 1
325 Eden Isles Drive
Slidell, Louisiana 70458

Dear CDR. Erickson:

This is in response to your request for exemption for Sea Explorer Ship 1, Boy Scouts of America from application fees for radio licenses used on two recreational boats which the Boy Scouts own and operate.

You state that the Boy Scouts is a non-profit organization and that the particular purpose of its Explorer Ship 1 unit is to provide young adults with maritime experience and training. Moreover, you state that Congress has exempted the Scouts from "user fee" taxes on vessels it owns, and contend that the Commission should similarly exempt the Scouts from radio application fees.

In a recent decision, the Commission declined to exempt the Sea Scouts from fees associated with obtaining certification of radios installed on its vessels. See Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC Rcd 5919, 5926 (1991). Therein, the Commission decided that Congress limited fee exemptions to only some non-profit entities and had created no specific exemption for youth oriented non-profit organizations. In this regard, the Commission noted that Congress had narrowly restricted the Commission's waiver authority, but that a waiver of the fee requirement for Sea Scout programs would require similar broad waivers for the many other groups having equally laudable purposes. Id. Consequently, the Commission concluded that a waiver of the fee requirement for the Sea Scouts would not promote the public interest.

Accordingly, your request must be denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 19 1992

Randolph Young, Esq.
2033 M Street, N.W.
Suite 400
Washington, D.C. 20036

Dear Mr. Young:

This is in response to your request for refund of hearing fee submitted on behalf of the John Senior Broadcasting Corp. (John Senior), applicant for a new FM station at Manahawkin, New Jersey.

You state that John Senior tendered its hearing fee on July 16, 1991. You further state that John Senior entered into a Joint Petition for Approval of Settlement Agreement which was resubmitted to the presiding judge on August 16, 1991, prior to the Notice of Appearance deadline specified in the Hearing Designation Order. That agreement provided for the dismissal of John Senior's application and grant of a competing application. You now request that John Senior's hearing fee be refunded pursuant to Section 1.1111(c)(1) of the Commission's rules.

Section 1.1111(c)(1) provides for refund of the hearing fee in cases where a Settlement Agreement is filed by the Notice of Appearance deadline and the remaining applicant is immediately grantable or if matters specified in the designation order can be deleted. 47 C.F.R. §1.1111(c)(1). Because John Senior participated in the Joint Petition for Approval of Settlement Agreement and its application was subsequently dismissed by the presiding judge, see Memorandum Opinion and Order, FCC 91M-2893, released September 23, 1991, John Senior's hearing fee refund request will be granted.

Accordingly, a check for $6,760, payable to John Senior Broadcasting Corp., will be sent to 615 Welk Drive, Ocean City, New Jersey, 08226, at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section, at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Arthur I. Steinberg, Administrative Law Judge

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

Anne Thomas Paxson, Esquire
Borsari & Paxson
2033 M Street, N.W.
Suite 630
Washington, D.C. 20036

Dear Ms. Paxson:

This is in response to your request for refund of the rulemaking fee submitted by Southern Air Communications, Inc. (Southern) in connection with its petition for allocation of Channel 269C3 to Palmers Crossing, Mississippi.

You request a refund because the Mass Media Bureau returned Southern's rulemaking petition as unacceptable because it was contingent upon final action in another proceeding. See letter to Anne Thomas Paxson from Andrew J. Rhodes, Acting Chief, Policy and Rules Division, dated March 7, 1991.

A fee to cover a rulemaking for a higher class of channel is due, following approval of the rulemaking petition, at the time an application to reflect the change is filed. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3659-3660 (1989). Since Southern's petition was filed prematurely and dismissed when it was found unacceptable, we find that Southern is entitled to a refund of its rulemaking fee. Accordingly, your request is granted.

A check, made payable to Southern Air Communications, Inc. and drawn in the amount of $1,565.00, will be forwarded to you at the earliest practicable time. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JAN 30 1992

Mr. Rod Orr
Turtle Broadcasting Company of Branson, LP
P.O. Box S
Branson, Missouri 65616

Dear Mr. Orr:

This is in response to your request for a refund of the fee paid by Turtle Broadcasting Company of Branson, LP (Turtle), licensee of FM station KRZK, Branson, Missouri, in connection with its application to modify KRZK's facilities.

You state that Turtle filed an application (BPH-901130IB) to upgrade KRZK following the Commission's adoption of a Report and Order allocating a new, higher class channel to Branson. See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Branson, Missouri), 5 FCC Rcd 6596 (1990). The Mass Media Bureau initially accepted the application for tender, but then determined that the application had been inadvertently accepted since it was filed before the effective date of Branson's allocation. As an alternative to returning the application, the FM Branch treated Turtle's application as if filed on the effective date of the allocation, and assigned a new file number (BPH-901224IJ) to the application which it then conditionally granted, subject to the filing of a new application fee. See letter from Dennis Williams, Chief, FM Branch, dated April 24, 1991. You argue that Turtle filed its application prematurely due to its reliance upon erroneous advice from the Bureau staff and, furthermore, that the requirement for an additional fee is not justified by the resource burden involved in processing Turtle's application.

An application for a channel allocation may only be accepted after the allocation has been formally incorporated into the Commission's Table of Allotments. See 47 C.F.R. § 73.203. Thus, the Bureau properly dismissed Turtle's initial application as unacceptable for tender.

As the Commission's rules make no provision for refund of a filing fee once the application has cleared the fee review process, the fee that Turtle initially submitted cannot be credited as payment of the fee to cover the application upon which the Bureau based its grant to Turtle. Rather, the Bureau acted consistently with the rules by informing Turtle that a second application fee would be due since its earlier filed application had been dismissed. See Fee Collection Program, 2 FCC Rcd 947, 949 (1987),

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OFFICE OF
MANAGING DIRECTOR

APR 29 1992

Robert L. Olender, Esquire
Baraff, Koerner, Olender
and Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Olender:

This is in response to your request for a refund of the hearing fee submitted by Mr. W. Keith Walker, former applicant for a new FM station at Parker, Arizona.

You state that Mr. Walker's application was dismissed at his request prior to its designation for hearing. The Commission has determined that refunds of hearing fees shall be granted to applicants whose applications are dismissed, voluntarily or involuntarily, before a hearing designation order is issued. See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, drawn for $6,760.00 and payable to W. Keith Walker, will be sent to you at the earliest practicable time. If you have any questions about this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 21 1992

Dan J. Alpert, Esq.
Ginsburg, Feldman and Bress
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Alpert:

This is in response to your request for a hearing fee refund submitted on behalf of WSMK Enterprises, L.P. (WSMK), applicant for a new FM radio station on Channel 267A at Essex, New York.

You state that WSMK tendered its hearing fee on July 15, 1991. You further state that WSMK is the sole remaining applicant for this channel and there are no petitions filed against the applicant. Therefore, you state that no hearing will be necessary, and request refund of WSMK's fee.

If only one applicant files a Notice of Appearance and the application contains no outstanding issues and is immediately grantable, the Commission will refund the applicant's hearing fee. See 47 C.F.R. § 1.1111(c)(3). WSMK is neither the sole remaining applicant nor is its application immediately grantable.

One of the five applicants for the new FM station at Essex, Paul S. Goldman (BPH-891012NF), was dismissed by the Mass Media Bureau as inadvertently accepted for filing but has filed for reconsideration of this action. The Petition for Reconsideration, filed July 16, 1991, is still pending with the Bureau. Another applicant, R.J. Winter, Inc. (BPH-891012NB), also dismissed by the Bureau as inadvertently accepted for tender, filed, on April 22, 1991, an Application for Review that is still pending before the Commission.

Until the dismissals of the Goldman and Winter applications are final, WSMK cannot claim to be the sole remaining applicant. Reinstatement of either application nunc pro tunc would require that selection of the best qualified applicant from the competing proposals for Essex would have to be resolved through the comparative hearing process.

Moreover, WSMK's own application is not immediately grantable. WSMK was directed by the Bureau to submit an Environmental Assessment because its proposed facilities may affect Essex, which

*U.S. Government Printing Office: 1992 — 312-024/60014